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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1721

WLLE, INCORPORATED,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, WLLE, Incorporated ("WLLE"), respectfully requests that this Court issues a writ of *certiorari* to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINION BELOW

The decision of the Court of Appeals was ordered not to be published, under its Local Rule 8(f) but appears at

Appendix A to this Petition.[1] The decision of the Federal Communications Commission ("the FCC") which is reported at 65 FCC 2d 774 (1977) appears at Appendix B. The Initial Decision of the Administrative Law Judge ("the ALJ"), which was affirmed in part and modified in part by the Commission was not reported but appears at Appendix C.

JURISDICTION

The judgment of the Court of Appeals, which appears at Appendix A, was entered on January 23, 1979. A timely filed Petition for Rehearing and/or Suggestion for Rehearing *En Banc* was summarily denied on February 15, 1979, by separate orders which appear at Appendix D and E, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the failure of the court of appeals, in reviewing the decision of an administrative agency which resulted in the final revocation of a federal license, to resolve the legal issues presented to it by the licensee pursuant to the licensee's statutory appeal right and to articulate with reasonable clarity the basis of its decision denies the licensee due process in the exercise of its right to appeal?

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[1]The appendices are attached to this petition and cited as "Pet. App." In addition, references to "J.A." are to the Joint Appendix in the lower court containing hearing transcript excerpts and other pertinent documents. A copy of the Joint Appendix will be lodged with the Clerk of this Court.

STATUTES INVOLVED

47 U.S.C. §312(d) provides:

> In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

47 U.S.C. §402(b)(5) provides:

> (b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> * * * *
>
> (5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

5 U.S.C. §702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE

Course of Proceedings and Disposition by the Court and Agency Below

On December 21, 1973, the Federal Communications Commission issued an Order and Notice of Apparent Liability to WLLE, Incorporated and directed the licensee to show cause why its license for standard broadcast station WLLE, Raleigh, North Carolina, should not be revoked. As an alternative to revocation, the Order also provided for a determination as to whether a forfeiture

in the amount of $10,000 or less should be issued if, after a hearing, the record did not warrant revocation of the license. In its Order the Commission specified that inquiry be made into the following issues:

(a) To determine all of the facts and circumstances with respect to the licensee's advertising practices, and in light of the facts adduced, to determine whether its practices involved the use of any fraudulent schemes.

(b) To determine whether, and if so, the extent to which the licensee engaged in fraudulent billing practices in the operation of Station WLLE in violation of Section 73.1205 of the Commission's Rules.

(c) To determine whether, in light of the information giving rise to the preceding issues, if found to be true, the licensee possesses the requisite qualifications to remain a licensee of the Commission.

Section 312(d) of the Communications Act of 1934, as amended, 47 U.S.C. §312(d)(1964), provides that the burden of proof in such a proceeding shall be upon the Commission.

WLLE, Inc., was directed to appear and give evidence at a hearing to be held on the designated issues. A bill of particulars which gave details of the violations which were the basis of the Commission's Order to Show Cause was served upon WLLE in accordance with the requirements of the Commission's Order.

Prior to the commencement of the hearing, the licensee's major principal, Wallace Hankin, undertook a comprehensive investigation of the facts and circumstances surrounding the frauds and voluntarily submitted

to the Commission a two volume report of his findings (WLLE Exs. 10, 11). At the request and for the convenience of the Broadcast Bureau, (TR. 69, J.A. at 87) Hankin also prepared a statement (WLLE Ex. 1) outlining the basic facts involved in the frauds which was introduced into evidence at the hearing (TR. 76, J.A. at 90). This statement and the stipulation of facts (J.A. 187) entered into by Hankin established the frauds charged in addition to other illegal activities which Hankin uncovered during his own investigation and which he voluntarily reported to the Commission.

Hearings were begun in Raleigh, North Carolina, on December 10, 1974, and ultimately the record was closed on November 14, 1975. Proposed Findings of Fact and Reply Findings were filed by the licensee and the Chief of the Broadcast Bureau on December 8, 1975, and January 30, 1976, respectively.

In an Initial Decision, released March 25, 1976, (Pet. App. at 25a) the Administrative Law Judge ("ALJ") concluded that the licensee corporation had engaged in fraudulent billing practices in violation of Section 73.1205 of the Commission's Rules but that certain mitigating factors existed justifying a sanction less severe than revocation. The ALJ therefore ordered WLLE to forfeit the sum of $10,000. The Broadcast Bureau filed exceptions to the Initial Decision and a brief in support thereof, urging that it be reversed by the Commission and that WLLE's license be revoked in lieu of a forfeiture. WLLE filed exceptions and a statement in support of the decision wherein it asserted that forfeiture rather than revocation was the appropriate sanction. The Bureau and WLLE each filed a responsive pleading and oral argument was heared by the Commission on May 26, 1977.

On August 4, 1977, the Commission, Commissioners Lee and Hooks not participating, Commissioner White concurring in the result, released a decision (Pet. App. at 2a) in which it affirmed some of the findings of fact of the ALJ, noted errors in other of his findings of fact and ordered revocation of the license in lieu of the forfeiture sanction imposed by the ALJ. The Commission squarely rested its decision to revoke the license upon an erroneous disjunctive finding that the licensee's principal (57%) stockholder, Wallace Hankin, "either had actual knowledge of the fraudulent billing practices at the station or, his lack of such knowledge was the result of such gross neglect, intolerable indifference, and inexcusable lack of supervision and control over station operations as to constitute an abdication of licensee responsibility." (Pet. App. at 12a.)

Pursuant to the provisions of 47 U.S.C. §402(b), WLLE appealed the Commission's decision and on January 11, 1978, filed its brief in the Court of Appeals for the District of Columbia Circuit. The licensee presented the following issues to the court of appeals for its resolution:

I.

WHETHER THE COMMISSION'S DETERMINATION THAT THE LICENSE OF WLLE SHOULD BE REVOKED IS ARBITRARY, CAPRICIOUS AND UNREASONABLE BECAUSE THE COMMISSION SELECTIVELY IGNORED, MISSTATED OR MISCONSTRUED UNREBUTTED, UNIMPEACHED DIRECT TESTIMONY OF COMPETENT WITNESSES ON MATERIAL FACTS AND INSTEAD GAVE CONTROLLING WEIGHT TO INFERENCES DRAWN FROM CONFLICTING CIRCUMSTANTIAL EVIDENCE?

II.

WHETHER THE COMMISSION ERRED IN REVOKING APPELLANT'S LICENSE BY APPLYING PATENTLY DIS-

TINGUISHABLE PRECEDENT TO THE UNREBUTTED FACTS OF RECORD AND WHETHER SUCH MISAPPLICATION OF THE RELEVANT LAW SO INFECTED ITS OPINION AS TO VITIATE ITS DECISION?

In support of its position on the issues, the licensee submitted a sixty-eight page brief. Distilled to their essence, the licensee's principal contentions on appeal were:

- The Commission's decision to revoke the license of WLLE resulted from the dominant consideration it gave to four palpably erroneous findings of fact with respect to Hankin's involvement in the fraudulent activities of his employees.
- The Commission's misapplication of its relevant precedent was so flagrant as to constitute an arbitrary and capricious exercise of power.

In order to demonstrate that the license raised nonfrivolous issues which the court failed to resolve it is necessary at least to summarize the arguments advanced below. The following is a brief summary of the licensee's position in the court of appeals.

Erroneous Findings of Fact

Critical to the Commission's decision to revoke the license of WLLE was the dominant consideration it gave to its finding that the licensee's major principal, Wallace Hankin, had actual knowledge of overbilling because the number of false bills issued "was so great in proportion to the total" that he could not possibly have overlooked the discrepancies. (Pet. App. at 18a.) The Commission erroneously found that overbilling occurred with respect to 120 accounts out of a total

of only 138 accounts whereas the undisputed facts of record conclusively demonstrate that there were a total of "thousands" of accounts not 138 (TR. 1635). This fundamental mistake in its findings of fact so infected the Commission's opinion as to invalidate its decision to revoke. The court of appeals declined to resolve or rationalize this error.

Equally critical to the Commission's decision to revoke was its near total reliance on three other erroneous findings of fact. The Commission found, based upon the mere fact that Hankin was in daily contact with two of the conspirators, that it may be reasonably *inferred* that he had knowledge of their fraudulent activities. (Pet. App. 9a) In the Commission's words: "Hankin spoke almost daily to Daughtry and was in frequent contact with Dulaney . . . it therefore may reasonably be inferred that he was aware of their activities." (Pet. App. at 9a). Arrayed against this inference there was the unrebutted, uncontradicted and unequivocal testimony of Hankin, Daughtry, Walker, and Dulaney, the latter three testifying under a rule of sequestration, that Hankin had no knowledge of their wrongdoing. (Tr. 1165, 1189, 836; WLLE Ex. 1 at 21-23). Moreover, Daughtry, Dulaney and Walker had no reason to fabricate their testimony for Hankin's benefit. At the time of the hearing, Dulaney had been fired by Hankin (Tr. 182); Daughtry had resigned in disgrace because, she told Hankin, she felt "like a criminal" (Tr. 1427); and Walker had been fired by Gulf. Yet, the Commission found from Hankin's association with Dulaney and Daughtry that he "knew" of their unlawful activities. This finding was based upon speculative inference, and is contrary to the direct and positive evidence of record. It is well settled that inferences contrary to direct testimony are not ordi-

narily sufficient to support a finding. *NLRB v. Kaye*, 272 F. 2d 112, 114 (7th Cir. 1959). Moreover, an inference as to an unlawful intent, as drawn here by the Commission, is especially suspect and may not be lightly drawn nor based upon remote or speculative evidence. *Salinas Valley Broadcasting Corporation v. NLRB*, 334 F. 2d 604, 613 (9th Cir. 1964). Unless the Commission has established by a preponderance of the evidence that Hankin knew of and condoned Dulaney's and Daughtry's unlawful activities, it has not met its burden of proof with respect to this issue. It may not infer that knowledge based upon such speculative evidence as mere association. *Salinas, supra* at 613. The Commission should not be permitted to infer specific intent from circumstantial evidence when such an inference is directly contrary to the otherwise positive uncontradicted testimony of unimpeached witnesses which testimony affirmatively demonstrates that the fact sought to be inferred does not exist. The court of appeals declined to articulate its view on this issue presented by the licensee.

The Commission next assumed that Hankin had knowledge of the frauds by erroneously finding that fraudulent Gulf contracts were placed on Hankin's desk and it is "simply inconceivable that he would not have examined even one such contract." (Pet. App. at 9a). The undisputed evidence of record however reflects that only an original and one copy of each contract existed. One copy was given to each Gulf retail dealer and it has been conceded by Bureau counsel that another copy ended up in Gulf's Atlanta office. Hankin testified that he never saw the contracts and that they were not in the radio station files. Thus, despite

Daughtry's testimony that she usually placed the contracts on Hankin's desk, the extrinsic circumstantial evidence corroborates Hankin's testimony and establishes the fact that the contracts were never put on his desk but rather were sent to Gulf in Atlanta. On this issue, it is clear that the burden of proof mandated by Section 312(d) of the Communications Act of 1934, as amended, was not met by the Commission. *Salinas, supra* at 613. The court of appeals declined to discuss the effect of the burden of proof on this erroneous finding of fact.

Next, the Commission erroneously found that if Hankin did not know of the wrongdoing, it was because he placed "unreasonably heavy reliance on employees who were delegated substantial operational responsibilities and thereafter failed to exercise adequate supervision over station operations." (Pet. App. at 10a.) In arriving at the foregoing conclusion the Commission gave controlling weight to: (a) an inference that Hankin knew of the fraud because he was associated with Dulaney and Daughtry, (b) an assumption that he must have seen the Gulf contracts regardless of whether the evidence showed that they never were on his desk, (c) a surmise that he should have known of the fraud because his profits increased from one year to the next, and (d) a presumption that he was "intolerably indifferent" to his responsibilities merely because a fraud was perpetrated. In concluding that Hankin placed unreasonble reliance on his employees it selectively ignored *in toto* the following undisputed facts:

- Hankin worked daily with Dulaney for well over a year before making him station manager and considered him to be effective and competent in his work sufficient to make him a true, not token, Black manager of a Black station serving the Black community of Raleigh.

- Hankin worked at the station daily for at least four hours, and longer during billing sessions.
- Hankin personally prepared all billing, except those covertly prepared by Daughtry and Dulaney who were not given any authority whatsoever over billing.
- There was ample room to broadcast all of the spots actually sold to advertisers and thus there was no motive whatsoever for Hankin to overbill the non-Gulf accounts.
- Hankin handled all FCC matters, supervised the engineering department, handled all financing, stockholder relationships, and legal and accounting matters, did equipment purchasing and supervised the public service programming.
- Hankin received regular legal advice from Washington communications counsel and pursuant thereto in the exercise of his supervisory authority specifically advised Dulaney and the staff of the Commission's policy regarding fraudulent billing and all other pertinent policies within their domain.
- Eight character witnesses testified that Hankin's reputation for truth and veracity in the community is above reproach. No where did the Administrative Law Judge make any finding that Hankin was not truthful in his testimony. Yet, Hankin's testimony on every material issue was simply dismissed out of hand by the Commission in favor of what it considered to be "far more likely."

The articulated basis upon which the Commission found that Hankin should have known of the frauds simply cannot withstand scrutiny. Yet, the court of appeals

declined to rationalize how the Commission's finding of irresponsibility on the part of Hankin could be reconciled with the undisputed facts referred to above.

Finally, the Commission in paragraph 10 of its opinion, in effect, found that Hankin bribed Walker, a Gulf employee, to carry out the fraud against Gulf. (Pet. App. at 10a). It rejected Hankin's testimony outright in favor of what it found to be "far more likely." "What appears to be far more likely" is not evidence of facts, certainly does not qualify as an inference of fact and in reality amounts to no more than sheer speculation. The Commission drew an inference of specific intent contrary to the only undisputed testimony of record. This it may not do. *Salinas, supra* at 613.

Even granting the Commission the "wide latitude" which the courts traditionally accord findings of an administrative agency, on this record it is clear that the Commission abused and exceeded its authority because these essential elements of its order were not supported by a preponderance of the evidence as required by law.

Misapplication of Relevant Precedent

In deciding to revoke the license of WLLE the Commission specifically relied upon five of its prior decisions (Pet. App. at 13a), each of which is patently distinguishable on its facts. Implicit in each of the five cases cited by the Commission was the critical element of *scienter* on the part of the licensee's major principal. Such element does not exist in this case. In *United Broadcasting of Florida, Inc.*, 55 FCC 2d, 823 (1975), a finding was made that after flagrant double billing occurred and was made known to the absentee owner he did nothing to investigate and allowed it to continue. In *Monroe Broadcasters,*

Inc., 60 FCC 2d 792 (1976), the principals actually voted at a board of directors meeting to continue double billing. In *White Mountain Broadcasting Company, Inc.*, 60 FCC 2d 342 (1976), *aff'd* No. 76-2009 (D.C. Cir., filed April 9, 1979) the sole stockholder after becoming specifically aware of an egregious case of double billing determined only to "phase out" the fraud over a period of time so as to not unduly affect his profits. In *Eastminister Broadcasting Corporation*, 58 FCC 2d 24 (1976), *aff'd mem.* 559 F. 2d 187 (D.C. Cir., 1977), the chief executive officer and principal assumed no responsibility for billing yet signed blank affidavits which were used by his employees to double bill accounts. After he specifically knew the blank affidavits were used to defraud, he nevertheless continued the practice and further frauds resulted. Finally, in *Wharton Communications, Inc.*, 44 FCC 2d 489 (1973), a finding was made that the two principal owners engaged directly in willful fraudulent billing over a seven year period.

Obviously each of the foregoing cases is clearly distinguishable on its facts from the instant case. The Commission's total reliance on these cases to "clearly support an order of revocation" is arbitrary and capricious.

Appellant contended in the court of appeals that the Commission denied it the fundamental right to a dispassionate view of the evidence and a reasoned application of the law and that its decision should be reversed and the case remanded.

The brief of the appellee, the Federal Communications Commission, did not meet the issues presented on appeal nor did it present a justification for the Commission's opinion based upon the rationale articulated by the Commission. Rather, the appellee constructed a new rationale to justify the result reached by the Commission

and attempted, after the fact, to infuse into the Commission's opinion selected and disparate elements of the admittedly erroneous rationale articulated by the ALJ in his inital decision.

One significant error in the ALJ's Initial Decision, which was conceded by the Commission but apparently deemed harmless, is worth illustrating because the Commission and the court of appeals declined to even discuss its impact on the central issue of Hankin's credibility and thus culpability.

In his Initial Decision, the ALJ demonstrated that he totally misapprehended the evidence presented to him at the hearing and the manner in which the Gulf fraud was perpetrated. In paragraph 34 of his findings, the ALJ described the mechanics of the Gulf fraud as follows:

> Daughtry was instructed regarding the paper work necessary to take advantage of Gulf Oil's advertising program. Advertising proposals were prepared, signed by the respective retail dealers and submitted to Gulf Oil by Walker. Once the proposals were approved advertising contracts were executed by the Gulf dealers and station WLLE. After the commercials were presumably broadcast *bills which were prepared and marked paid by Hankin*, together with affidavits of performance, *were submitted to Gulf Oil through Walker*. Checks from Gulf Oil for one half of the amount billed were then sent to the dealers. *Initial Decision, Findings* at paragraph 34. (Pet. App. at 40a) (emphasis added).

Based upon these findings, the judge then concluded as a matter of law that:

> *WLLE submitted bills which were marked paid to a number of Gulf Oil service station owners.* These bills had, in fact, not been paid. *They were prepared*

> in this form so that they could be submitted to the Gulf Oil Corporation by the service station owner who had a cooperative advertising arrangement with the Gulf Oil Corporation. Under the arrangement the service station owner was supposed to pay the bill for broadcast advertising and then submit the paid bill to Gulf Oil to obtain a rebate of one half of the amount of the bill. Actually, WLLE had an understanding with the service station owners that they would not have to pay anything for advertising Gulf products. *Bills were marked paid in furtherance of a scheme by WLLE personnel* acting in concert with a Gulf employee whereby the entire cost of the advertisng was to be borne by the Gulf Oil Corporation. Initial Decision, Conclusions at paragraph 3. (Pet. App. at 55a) (emphasis supplied)

In light of the foregoing, the ALJ found that Hankin knew or should have known of the Gulf fraud. If the foregoing were true, the ALJ, of course, would have been compelled to find that Hankin knew of the fraud because Hankin would have been a direct participant in the "scheme" by falsely making bills "paid" that he would have known had not been paid. However, the Broadcast Bureau and the Commission both conceded[2] that WLLE was correct in excepting to that erroneous finding because in fact the clear and only evidence of record demonstrated that Barbara Daughtry, in totally separate transactions and in concert with others, had falsely marked the bills "paid", not Hankin.

Obviously, the ALJ totally misapprehended the manner in which the Gulf fraud was perpetrated and the identity of the participants. This error in the ALJ's find-

[2]See Broadcast Bureau Exception No. 7; WLLE Exception No. 11 and the Commission's ruling thereon.

ing can in no sense be considered harmless or inconsequential. The ALJ found that "In every instance the invoices which were marked paid and submitted to Gulf Oil for reimbursement were false in that they were not paid." *Initial Decision, Findings* paragraph 36. (Pet. App. at 41a). Having erroneously assumed that Hankin falsely marked the bills paid when he should have known that they were not, the ALJ was bound to find that Hankin knew, or should have known of the Gulf fraud.[3] In analyzing the evidence, the ALJ failed to realize that two totally separate billing transactions were simultaneously taking place. One transaction, the fraudulent billing, involved Dulaney, Walker and Daughtry who were engaged in covert *ultra vires* acts. The second transaction, the routine station billing, was handled solely by Hankin in the normal performance of his duties. The ALJ failed to perceive that there were these two separate billing transactions and assumed instead that there was only one transaction and that Hankin was involved with Dulaney, Daughtry and Walker in their billings, which were admittedly fraudulent. WLLE excepted to the ALJ's finding on this issue and the Commission, in an Appendix, ruled as follows:

> *GRANTED* to the extent that the invoices submitted to Gulf were not marked "paid" nor submitted by Hankin, and to the extent indicated in the Decision; *DENIED* to the extent that the requested finding regarding Hankin's participation or knowledge is not warranted since there is evidence of record

[3]Having erroneously concluded that Hankin was actively involved in the Gulf fraud by falsely marking bills "paid" it was a short step for the ALJ to assume and thus conclude, again erroneously, that Hankin also "should have known" of the non-Gulf frauds.

> indicating that Hankin either knew of, or should have known of the fraudulent billing; and *DENIED* in all other respects as decisionally insignificant. (Pet. App. at 22a).

Nowhere, however, did the Commission point to the other persuasive "evidence of record indicating that Hankin either knew of, or should have known of the fraudulent billing." The Commission, as did its counsel on appeal, constantly reiterated that there was ample evidence of record indicating that Hankin knew of the fraud, yet nowhere did the Commission or the ALJ make a single citation to the record to support this proposition. This practice has been condemned repeatedly and most recently by the court below in *Cosmopolitan Broadcasting Corporation v. FCC*, 581 F. 2d 917 (D.C. Cir. 1978), where the court observed:

> Unfortunately, the ALJ did not support his conclusion by citations to the record, and neither did the Commission.[22] We cannot stress too strenuously the importance of such citations. [cases omitted]. We cannot know in their absence precisely upon what evidence the Commission or the ALJ relied in reaching their factual conclusions. Thus we are left without guidance to scour the massive ten volume record in this case for ourselves, to speculate whether or to what extent, if any, the Commission relied upon and appropriately considered any evidence that we may unearth, and to evaluate this evidence without direction from the Commission. This procedure is both wasteful of judicial resources and inconsistent with the proper deference due the Commission.

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[22]In fact, at *no* point in his decision did the ALJ support his factual conclusions by citations to the underlying record. The Commission referred to the record only fleetingly.

What is more disturbing is that the Commission did not even attempt to assess the impact on the ALJ's ultimate conclusion (that Hankin knew or should have known of the Gulf fraud) of his admittedly erroneous finding that Hankin was directly involved in the fraud by falsely marking bills "paid" that he knew were not paid. The Commission simply passed over the matter as if it were of no consequence when in fact it was central to the ALJ's conclusions. Nor did the Commission or the court below attempt to assess whether the fruit of this poisonous tree infected the remainder of the ALJ's opinion. If the ALJ truly believed that Hankin falsely and knowingly marked the Gulf bills "paid" when Hankin knew they were not, as the ALJ did find, it is difficult to comprehend how this belief would not materially affect the ALJ's view of the rest of the evidence on the non-Gulf accounts.

Clearly, the ALJ's opinion that Hankin knew or should have known of the fraudulent Gulf billing is thoroughly vitiated because he erroneously assumed that Hankin was directly involved. Yet, the Commission accepted the bulk of his findings as the basis for its decision and the court below declined to discuss the issue even though it was raised explicitly by the licensee.

In its reply brief. the licensee, citing *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947), urged the court to judge the propriety of the Commission's action solely by the grounds invoked by the Commission in its opinion -- not by the grounds invoked by its counsel on appeal. During the course of its thirty page reply brief the licensee carefully demonstrated the errors and mischaracterizations of the record contained in appellee's brief and once again urged the court to undertake a rigorous analysis of the Commission's

decision rather than merely accepting the alternative rationale newly constructed by appellee's counsel on appeal.

In a *per curiam* order, the Court of Appeals, without any discussion of the issues raised, simply affirmed the decision of the Commission as written and for the "reason that there is substantial evidence in the record in support of that decision." Since the panel declined to articulate the rationale it employed in disposing of the issues presented by the licensee, the licensee was compelled to speculate and to attempt to divine from the few comments at oral argument the basis of the court's decision. Clearly, the other members of the full court were in similar positions as they reviewed the petition for rehearing and suggestion for rehearing *en banc* filed by the licensee. That petition also was summarily denied -- nine days after it was filed.

REASONS FOR GRANTING THE WRIT

The only protection which an individual citizen has against the arbitrary and capricious exercise of executive power by a federal agency is his right to appeal to the federal courts. Petitioner submits that such a right is meaningless if the courts are permitted to deny the relief sought without resolving, at least in some minimal form, substantial legal issues presented to it for review. Petitioner admits that the central issue presented by this petition is one of first impression without explicit support in established precedent.[4] However, petitioner

[4]Clearly, however, the underlying rationale is not novel because this Court and the court below have long since imposed this requirement on administrative agencies, recognizing that it is an essential requisite of administrative due process. *See, e.g.,*

[footnote continued]

contends that the right to a reasoned explanation for the denial of relief sought on appeal from the decision of an administrative agency inheres in the very right to the appeal itself and its recognition would be but a logical step in the progress of the law toward its goal of preserving the integrity of the processes of government.

Unlike the discretionary writ of *certiorari*, an appeal to the federal courts from an adverse decision of an administrative agency is a matter of right preserved by the Administrative Procedure Act, 5 U.S.C. § 702, and in most cases by the enabling legislation of the agency involved. *See, e.g.*, Communications Act of 1934, as amended, 47 U.S.C. § 402(b). Thus, the court of appeals is compelled to hear and decided the case and it must do so upon the basis of the record viewed as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Moreover, when an appeal is based upon a contention that the findings of the administrative agency are not supported by substantial evidence, this Court has held that the reviewing court may not content itself merely with viewing the evidence in support of the agency's findings. The court also must take into account whatever in the record fairly detracts from the weight of the evidence. *Id.* at 488.

Indeed, the Commission itself, on remand in *Sea Island Broadcasting Corp.*, 69 FCC 2d 1796, 44 Pike & Fischer Radio Regulation, 2d 1265 (1978), recognized that in a license revocation case the substantial evidence standard meant that the Commission must sustain its burden of proof by a "preponderance of the evidence." *Sea Island,*

Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 196-197 (1947) and *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

supra 69 FCC 2d at 1797. *A fortiori*, the court of appeals must satisfy itself that the Commission has met its burden and that its essential findings are supported by a preponderance of the evidence of record.[5]

In *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841 (D.C. Cir., 1970), *cert. denied*, 403 U.S. 923 (1971), the court of appeals held that its function was precisely "to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts . . . ." *Id.* at 851. This decision making standard for the agency was further refined when the court in *Cosmopolitan Broradcasting Corporation v. FCC*, 581 F. 2 917 (D.C. Cir. 1978) noted that it could not "stress too strenuously" the importance of requiring the Commission and the Administrative Law Judges to support their findings of fact and conclusions by citations

[5]The *per curiam* judgment in the instant case that the Commission's decision was supported by "substantial evidence" does not meet this test, even assuming *arguendo* that a reasoned decision is not a prerequisite to fulfillment of the right of appeal. On remand in *Sea Island Broadcasting Corp. v. FCC*, Docket No. 76-1735 (D.C. Cir., filed June 23, 1978), while the instant case was pending, the court of appeals requested that the Commission state what standard of proof it employed in deciding that case and what the effect would be on the public interest if the Commission were required to apply a "clear and convincing" standard of proof to issues of fact in license revocation proceedings. Based upon this query to the Commission and the court's failure to articulate its view of the standard of proof required to be used in determining whether substantial evidence exists to support the findings in the instant case, no one knows what standard the court of appeals employed. *Compare Sea Island Broadcasting Corp.*, after remand, 69 FCC 2d 1796 (December 11, 1978) (preponderance of the evidence standard) *with Collins Securities Corporation v. SEC*, 562 F.2d 820 (D.C. Cir. 1977) (clear and convincing standard).

to the record, especialy when the Commission (as in the instant case) is charged with the burden of proof in the proceeding. *Id.* at 927-928. No such citations appeared in the decision of the Commission in the instant case and the court of appeals declined to comment on this requirement when the licensee raised the issue in its brief.

Finally, as this Court held in *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947)

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency*. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. *Id.* at 196. (Emphais added).

Read together, petitioner contends that these cases impose the following constraints on an agency engaged in an adjudicatory determination.

- The agency must give reasoned consideration to all of the evidence of record and in making findings of fact it must take into account any evidence of record which could fairly detract from a given finding, giving due consideration to the fact that when the agency has the burden of proof, its findings must be supported by at least a preponderance of the evidence of record.
- In issuing its decisions in an adjudicatory proceeding an agency must set forth its findings of fact and conclusions with particularity, and the agency must cite to those portions of the record which it believes substantiate its findings.

– The agency must articulate with reasonable clarity its reasons for decision and identify the significance of the crucial facts upon which its decision turns.

Petitioner also contends that when the court of appeals reviews a decision of the Federal Communications Commission in an adjudicatory proceeding the dictates of due process, as enunciated in the cases cited above, and as necessarily following from the "right of appeal," require the court to:

– Determine whether the particular findings of fact made by the Commission are supported by a preponderance of the evidence of record.

– Determine whether the Commission has given reasoned consideration to all the material facts and issues.

– Determine whether the Commission has articulated with reasonable clarity its reasons for decision and identified the significance of the crucial facts, while providing citations to the record to substantiate its findings.

– Determine whether the rationale articulated by the Commission as the basis for its decision is consistent with the underlying facts of record and provides a reasonable basis for its decision which is consistent with established policy and law.

– Base its judgment as to whether the Commission's action is the product of reasoned decision-making *solely* on the grounds invoked by the Commission for its action; the court may not rely on *post hoc* rationalizations of the Commission's counsel on appeal nor substitute what it considers to be a more adequate or proper basis for the decision. Neither may the court simply affirm because it perceives that the record *could* support and ultimate conclusion similar to the Commission's if only the Commission had articulated a more rigorous rationale.

When, as in the instant case, an appellant presents to the court of appeals particularized allegations of gross deficiencies in an agency decision which resulted in the final revocation of appellant's license to do business, petitioner submits that the court also has a duty and obligation to resolve the issues presented to it by the licensee and to articulate with reasonable clarity the bases of its decision. If the right to appeal is to have any meaning it must include the right to a reasoned decision that is not the judicial echo of the agency's judgment. Otherwise, the court of appeals must be considered to have arrogated to itself a *quasi-certiorari* power which effectively transforms the appellate right into an illusion.

Petitioner does not suggest that, in every instance, the court of appeals must issue an exegesis on the issues presented to it by an appellant. However, petitioner does submit that the failure of a court of appeals to articulate any reasons whatsoever for rejecting all of the arguments advanced by an appellant is itself arbitrary and capricious and bespeaks an insensitivity to litigants who in good faith come before the court to seek the justice they believe to have been denied to them.

Under the present state of the law a three member panel of any court of appeals in the United States may, unfettered by any explicit precept of decision making, deny relief to any litigant without a statement of reasons regardless of the merit or complexity of the issues raised.

Limited as an appellant is to a pleading of no more than fifteen typed pages on petition for rehearing or suggestion for rehearing *en banc*, he is unlikely to gain further review unless another judge of the court of appeals or the Supreme Court on petition for *certiorari* can be persuaded to review the briefs on appeal. Such is not only a waste of precious judicial resources, it also is calculated to encourage more lengthy petitions for writs of *certiorari* as litigants become determined that their case will be heard. A requirement for a reasoned, albeit cogent, opinion by the court of appeals on the issues presented to it for decision would cause the expenditure of far less judicial time and would do more to insure that the judges actually come to grips with the issues presented to them than the present system. Under the present system a court is empowered to dismiss a case without commending to the litigants or other members of the judiciary the logic of their *ratio decidendi*. While no one questions the competency of any given panel, it does seem plain that any busy court can err or misapprehend the nature of an issue presented. Yet, even when the loss of one's livelihood by the revocation of a federal license is at stake, the present system does not entitle the licensee to a statement of reasons. It is worth emphasizing that when a licensee appeals an order from the Commission he is granted his first and invariably his only day in a federal court. Under these circumstances it should appear manifest that the licensee is entitled to know why the court has sanctioned the loss of his livelihood.

The court's judgment in this case is the judicial equivalent of an administrative agency decision which revokes a license for no other reason than that it is in the "public interest, convenience and necessity." Both meet the statutory litmus test, but neither heeds the mandate of

due process. As the courts have implicitly recognized in requiring an agency to articulate with particularity the rationale for its decisions, the "public interest" has no generic meaning equally applicable to all cases but rather must be defined specifically within the context of each particular case. In the abstract, the "public interest" is a lifeless phrase. It is the well-reasoned opinion of an agency decision, giving careful weight to all evidence and viewpoints submitted, which breathes life into this standard and assures that the public interest is served and not the dogmatic will of governmental officials. Similarly, a finding by the court of appeals that an agency decision is based on "substantial evidence", without any articulation of its reasons for rejecting contrary views effectively denies a licensee his right to appeal.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that a writ of *certiorari* be issued to review the judgment below.

Respectfully submitted,

VINCENT A PEPPER

JAMES J. MCGILLAN

Attorneys for Petitioner.

May 15, 1979

APPENDIX

APPENDIX A

NOT TO BE PUBLISHED – SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1787 – September Term, 1978

WLLE Incorporated, Appellant

v.

Federal Communications Commission, Appellee

APPEAL FROM AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: McGOWAN, LEVENTHAL and MacKINNON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the Federal Communications Commission and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the order of the Federal Communications Commission under review herein is hereby affirmed on the basis of the decision of the Federal Communications Commission, released August 4, 1977, and for the reason that there is substantial evidence in the record in support of that decision.

Per Curiam
For the Court

George A. Fisher
Clerk
Filed Jan. 23, 1979

APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Revocation of the License of

WLLE, Incorporated (WLLE)
Raleigh, North Carolina

DOCKET NO. 19908

Appearances

John T. Kelly and *Robert A. Zauner* on behalf of the Chief, Broadcast Bureau and *Vincent A. Pepper* and *James J. McGillan* on behalf of WLLE, Incorporated.

DECISION

Adopted: July 21, 1977; Released: August 4, 1977

By Commissioner Washburn for the Commission:

(Next 3 lines to be moved over)

Commissioner Lee and Hooks not participating; Commissioner White concurring in the result.

1. Before the Commission is the revocation proceeding against WLLE, Incorporated (WLLE), licensee of station WLLE, Raleigh, North Carolina. By Order and Notice of Apparent Liability, FCC 73-1358, released December 21, 1973, the Commission designated this proceeding for hearing on the following issues:

(a) To determine all of the facts and circumstances with respect to the licensee's advertising practices and, in light of the facts adduced, to determine whether its practices involved the use of any fraudulent schemes.

(b) To determine whether, and if so, the extent to which the licensee engaged in fraudulent billing practices in the operation of station WLLE in violation of Section 73.1205[1] of the Commission's Rules.

(c) To determine whether, in light of the information giving rise to the preceding issues, if found to be true, the licensee possesses the requisite qualifications to remain a licensee of the Commission.

We further stated that if the record did not warrant an order revoking the license of WLLE, a determination should be made whether a forfeiture of $10,000 or some lesser amount should be imposed pursuant to Section 503 (b) of the Communications Act of 1934, as amended.[2]

2. In an Initial Decision, FCC 76D-19, released March 25, 1976, Administrative Law Judge (ALJ) Ernest Nash concluded that the licensee had engaged in fraudulent billing practices in violation of Section 73.1205 of the Commission's Rules but that certain mitigating factors existed, justifying a sanction less severe than revocation. The ALJ therefore ordered WLLE to forfeit the sum of $10,000. The Broadcast Bureau filed exceptions to the

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[1] Section 73.1205 provides in pertinent part as follows: "No licensee of a . . . broadcast station shall knowingly issue to any . . . advertiser . . . manufacturer . . . or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such . . . document is issued . . . Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any documents which would violate this section if issued by the licensee."

[2] Under Section 312(d) of the Act, the burden of proof in this proceeding was upon the Broadcast Bureau.

Initial Decision (I.D.) and a brief in support thereof, urging that the I.D. be reversed and that WLLE's license be revoked because the violations were egregious and because there were no significant mitigating factors. WLLE filed limited exceptions and a statement in support of the I.D. that included a brief wherein it asserted that forfeiture rather than revocation was the appropriate sanction. The Bureau and WLLE each filed a responsive pleading. Oral argument was heard before the Commission *en banc* on May 26, 1977.

3. The ALJ's findings of fact were basically predicated upon the stipulations of the parties, wherein, in all significant respects, WLLE admitted the fraudulent billing violations. Consequently, related findings are affirmed except as modified in the Decision and in the rulings on exceptions contained in the Appendix. We disagree, however, with the ALJ's ultimate conclusion that revocation was not warranted. In light of the facts in this case, such a conclusion is clearly inconsistent with Commission precedent and is contrary to the public interest.

4. The key persons at the station who engaged in the fraudulent billing were Wallace L. Hankin, James Dulaney and Barbara Daughtry. Hankin, president and owner of 57% of the stock of WLLE,[3] has been in charge of the station and active in its day-to-day operations since 1965 when the broadcast license was obtained. Throughout the occurrence of the fraudulent billing, Hankin was responsible for the billing and bookkeeping.[4] Hankin, however,

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[3] Two other corporate officers, John F. Cussen (vice-president and director) and Wendell R. Barney (secretary, treasurer and director), each of whom own 19% of the stock, were never active in the management or operation of the station.

[4] With respect to certain procedures at the station comcing in the latter part of 1971, Hankin made the following statement (WLLE Exhibit 1, p. 12):

[footnote continued]

delegated the management of the station to Dulaney who was given full control over the station's employees. Dulaney, who began his employment with WLLE as a salesman in 1966, was eventually delegated virtually all sales responsibility and was made station manager with supervisory authority over traffic, air, and broadcast personnel. He was vice-president from July 30, 1969 to May 9, 1973[5] and became a 5% stockholder as of May, 1971. Daughtry, who was the traffic manager from 1968 to 1973, prepared the start orders[6] as well as the affidavits of performance and the program logs. The fraudulent billing encompassed two distinct areas: (1) overbilling of 120 advertisers (referred to herein as the non-Gulf Oil accounts) and (2) double billing of local merchants who had cooperative advertising agreements with Gulf Oil Corporation (referred to herein as the Gulf Oil accounts).

"... Other changes were made at this time. The bookkeeping and billing was previously done by a part-time bookkeeper in her home. However, with the growth in our operations, the magnitude of the billing and accounting work had grown to the point that it required closer personal supervision. Accordingly, I decided to bring the billing into the station and do it myself."

The ALJ found and concluded that in 1971, Hankin discontinued the services of a part-time bookkeeper working at her home and that thereafter he kept the books and prepared the station bills which were sent to the advertisers (I.D. pars. 9, 12, and Conclusion pars. 6 and 9). No exceptions were taken by WLLE to these findings and conclusions.

[5] Dulaney's employment at the station was terminated on or about May 9, 1973 as a result of the wrongdoing discussed herein.

[6] The start orders contained the name and address of the advertiser, the dates during which the commercial announcements were to be broadcast, the number and duration of the announcements for each day, and the total contract amount.

5. *Overbilling of Non-Gulf Oil Accounts.* From April 1971 to March 1973 WLLE had overbilled 120 of its 138 accounts for advertisements which were not broadcast or which were broadcast at a time other than that specified in the affidavit. In preparing the program logs, Daughtry deleted therefrom and failed to enter thereon numerous commercial broadcasts for which advertisers had contracted. But she nevertheless entered on both the start orders and the affidavits the total number of commercials requested by the advertisers. The start orders and affidavits were given to Hankin, who prepared the bills from the incorrect start orders. A few examples will serve to illustrate the method by which the overcharges were achieved. Between February 1, 1972 and January 1, 1973, Bank of North Carolina was billed for a total of 2,880 spots whereas only 436 had been broadcast, a shortage of 2,444 spots. Gallo Wine was billed for 6,500 spots represented to have been broadcast between February 1, 1972 and February 26, 1973 although only 855 were actually broadcast, a shortage of 5,645 spots. O'Neal Motors was billed for 3,030 spots covering the period from July 3, 1972 to April 1, 1973 whereas the number broadcast was 755, a shortage of 2,275 spots. While the overbilling of other accounts was not as extensive, the 120 local advertisers overpaid $68,000 by reason of the false bills and affidavits of performance submitted to them by WLLE.

6. *Double Billing of Gulf Oil Corporation.* Gulf Oil Corporation had a cooperative advertising program whereby it refunded 50 percent of the cost for the independent dealers in Raleigh to advertise on local radio. During August, 1972, Mr. Dulaney and William O. Walker, Gulf's retail marketing representative in the Raleigh area, instituted a plan whereby the Gulf service station

dealers could advertise at no cost to themselves. After a contract between WLLE and the local dealer was executed, it was given to Daughtry by Dulaney. As in the case of the non-Gulf Oil accounts, the program logs establish that the number of spot announcements for which the local dealers had contracted was not actually broadcast. Nevertheless, Daughtry prepared invoices and affidavits of performance which reflected the number of spots and the dollar amounts specified in the contracts. The invoices were marked "paid" before their submission to the Gulf Oil Corporation through Walker for the 50 percent payment to the local Gulf Oil dealers. Daughtry also prepared start orders which conformed to the number of spots specified in the contracts but which manifested a dollar amount only approximately half the contract price. Hankin prepared and sent to the local dealers a second set of invoices based on the dollar amounts set forth in the start orders.

7. Neither the local Gulf Oil dealers nor Gulf Oil Corporation received the number of spots or the dollar value of the advertising for which they had contracted and for which they had been billed by Hankin and Daughtry respectively. Thus, whereas the contracts on behalf of the nine Gulf Oil dealers covering the period under consideration called for over 7,000 spots, only approximately 2,000 were run, a shortage of about 5,000 announcements. As a result, Gulf Oil was billed approximately $33,000 for advertising having an actual value, at contract price, of approximately $9,000. Because the fraudulent billing was discovered before all bills had been paid, Gulf Oil Corporation only transmitted to the local dealers checks totalling about $9,000. Pursuant to the cooperative advertising agreements, Gulf Oil Corporation was obligated to pay only 50 percent of the cost, so its

actual overpayment was about $4,500. Upon receipt of the checks from Gulf Oil Corporation, the dealers, in most instances, endorsed them to WLLE. Said checks constituted the only payments made to WLLE on the dealers' accounts. Hankin received and made the bookkeeping entries with respect to at least 10 such checks.

8. The ALJ held that it was reasonable to conclude Hankin should have known about Daughtry's actions which resulted in the false or fraudulent billing. He furthur concluded that Hankin either had actual knowledge or, in the exercise of reasonable diligence, would have known that bills and affidavits of performance being sent out were in many instances fraudulent and in violation of Section 73.1205 of the Rules. By reason of the foregoing and the extensive violation of Section 73.1205, the ALJ held that the imposition of the sanction of revocation would be justified "absent other considerations," but determined that such other considerations were present and imposed a forfeiture of $10,000. In agreement with the ALJ, we likewise conclude that Hankin either had actual knowledge of the wrongdoing at the station or, in the exercise of the reasonable diligence expressly required of licensees by Section 73.1205, should have known of the violations. However, in light of the nature, extent and duration of the violations, the effectuation of fraudulent overbilling and double billing by principals of WLLE, the wholly inadequate supervision of station operations by the licensee, which made the violations possible, and other matters discussed herein, we conclude that no other considerations of decisional significance have been shown which would justify a sanction less than revocation.

9. Hankin is an experienced broadcaster with over seventeen years in the business. Throughout the period in question he was fully aware of the prohibition against fraudulent billing practices contained in Section 73.1205.

The bookkeeping and billing of the advertising accounts were the particular responsibility of Hankin during the time that the fraudulent billing occurred. He was at the station from 9:00 a.m. to 1:00 p.m. each day and, when doing the billing he worked there a full day. WLLE is a small station, which had only 9 full-time employees from 1971 to 1973. Hankin spoke almost daily to Daughtry and was in frequent contact with Dulaney and it therefore may reasonably be inferred that he was aware of their activities. Additionally, the Gulf Oil contracts were placed by Daughtry on Hankin's desk, along with the start orders, and even a cursory examination of these documents would have disclosed the discrepancies between the dollar amounts specified in the contracts and those set forth in the start orders and in the bills which Hankin prepared for submission to the local dealers. It is simply inconceivable that he would not have examined even one such contract. He was aware of the cooperative plan between Gulf Oil Corporation and the local dealers. At least 10 of the Gulf Oil checks which had been endorsed by the local dealers were received by Hankin and he credited these payments to the local dealers' accounts. Consequently, he could have hardly failed to notice that the checks from Gulf Oil Corporation were the only payments received by the station for Gulf Oil Advertising.[7] Hankin's explanation that he was not thereby alerted to the existence of a double billing scheme because of the particular method of depositing the checks and recording the payments is unpersuasive. At the very least, his

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[7] In May, 1971, Hankin signed contracts with two local Gulf dealers for spot announcements on WLLE. As in the case of the 1972-1973 contracts, the local dealers made no payments to the station for the spots broadcast. The only payments received by WLLE were from Gulf Oil Corporation.

knowledge of the Gulf Oil cooperative advertising plan combined with the fact that only Gulf Oil checks were received in payment for such advertising should have placed Hankin on notice that further inquiry was required.

10. Although Hankin did not deal directly with Walker, the Gulf Oil representative, he did issue to him six checks totalling $1,250, presumably to promote sales. Despite Hankin's contention that he did not know exactly who Walker was or exactly what services he would render, we find it to be exceedingly unlikely that this experienced businessman would issue checks for such a substantial sum with so few questions asked. What appears to be far more likely is that the checks were issued to Walker for his assistance with the fraudulent billing scheme and Hankin either knew the purpose for these payments or deliberately refrained from asking questions which might reveal the existence of wrongdoing at the station.

11. If Hankin did not have actual knowledge of the double billing and overbilling at the station, it was because he placed unreasonably heavy reliance on employees who were delegated substantial operational responsibilities and thereafter failed to exercise adequate supervision over station operations. Section 73.1205 expressly requires licensees to "exercise reasonable diligence to see that their agents and employees do not issue any documents" containing false information; and, manifestly, the licensee of WLLE did not fulfill this obligation. Even assuming, as Hankin claims, that he instructed Daughtry as to the preparation of the start orders and affidavits of performance, he never thereafter made any check to see whether she was performing her functions properly. Had Hankin compared the start orders and the affidavits with the program logs (which were accurate), even on a spot check basis, he would have discovered the inaccuracies.

As a result of Hankin's almost total disregard of his supervisory responsibilities, bills, invoices, and affidavits of performance for thousands of spots which had not been broadcast were sent to 120 non-Gulf Oil accounts over a two-year period. Those accounts therefore over-paid more than $68,000 to WLLE. Overpayments for spots not broadcast were likewise made by Gulf Oil Corporation, on behalf of the local dealers, as a result of the issuance of fraudulent invoices and affidavits. Also, had Hankin made any inquiry of Daughtry concerning the procedures she followed with respect to the Gulf Oil accounts he would have learned that she was marking invoices "paid" which had not been paid. Thus, even minimal supervision of Daughtry's activities would have revealed the improper billing practices. An examination of any of the Gulf Oil contracts would have disclosed that the dollar amounts specified therein were approximately twice the amount stated on the start orders and on the bills prepared by Hankin for submission to the local dealers. Adequate supervision of Dulaney would have disclosed his wrongdoing; but Hankin was apparently content to allow Dulaney unlimited discretion as long as his actions benefitted WLLE by yielding increased revenues.[8]

12. A licensee cannot be permitted to escape the consequences of extensive fraudulent billing in violation of the rules merely because the principal stockholder, president, and overall manager of the station has insulated

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[8] Station revenues increased from $187,891 in 1971 to $296,784 in 1972 and payments to principals increased from $48,439 in 1971 to $87,014 in 1972. Because Hankin was responsible for the bookkeeping and billing, he must have known that this large increase in station revenues had occurred. If he had properly performed his duties he would have also ascertained that the increase was due, in part, to the fraudulent billing.

himself against contact with any sources which would have revealed the wrongdoing. *United Broadcasting Co. of Florida, Inc.*, 55 FCC 2d 832, 839 (1975). See also *Western Communications, Inc.*, 59 FCC 2d 1441, 1450 (1976). We do not have here a case of mere negligence on the part of a principal. On the contrary, substantial evidence of record establishes that the majority stockholder, president, and overall manager of day-to-day station operations either had actual knowledge of the fraudulent billing practices at the station or his lack of such knowledge was the result of such gross neglect, intolerable indifference, and inexcusable lack of supervision and control over station operations as to constitute an abdication of licensee responsibility. Furthermore, Dulaney, a 5 percent stockholder, vice president and station manager of the licensee, knowingly and actively participated in all aspects of the rule violations at WLLE. Since he was a principal of the licensee who had been delegated authority to act on its behalf, WLLE must be held accountable for his misconduct, particularly in light of the fact that Hankin failed to exercise any acceptable degree of diligence to insure that station employees complied with Section 73.1205. *Western Communications, Inc., supra* at 1449-1450; *Continental Broadcasting, Inc.*, 15 FCC 2d 120, 131 (1968), *reconsideration denied*, 17 FCC 2d 485 (1969), *aff'd sub nom. Continental Broadcasting, Inc. v. F.C.C.*, 142 U.S. App. D.C. 70, 439 F. 2d 580 (1971), *cert. denied* 403 U.S. 905 (1971).

13. The Commission has continually stressed its concern with fraudulent billing. See *Public Notice*, FCC 62-272, released March 9, 1962; *Fraudulent Billing Practices*, 1 FCC 2d 1068 (1965); *Applicability of Fraudulent*

Billing Rule, 1 FCC 2d 1075 (1965); *Fraudulent Billing Practices*, 23 FCC 2d 70 (1970); *In Re Applicabilty of Fraudulent Billing Rule*, 23 FCC 2d 303 (1970); *Applicability of the Fraudulent Billing Rule*, 59 FCC 2d 1268 (1976). In addition, because the practice of fraudulent billing did not cease despite the numerous warnings issued by the Commission, a notice was issued in order to emphasize that the Commission would consider renewal or revocation hearing proceedings in future fraudulent billing cases because such violations raise serious questions concerning the qualifications to remain a licensee. *In the Matter of Renewal or Revocation Hearing Proceedings in Future Fraudulent Billing Cases*, 38 FCC 2d 1051 (1972). Hankin was well aware of the Commission's policy regarding fraudulent billing, having discussed with Dulaney the public notice of May 15, 1970, *In re Applicability of Fraudulent Billing Rule*. In the circumstances of this case, applicable Commission precedent clearly support an order of revocation. *United Broadcasting Co. of Florida, Inc., supra; Monroe Broadcasters, Inc.*, 60 FCC 2d 792 (1976); *White Mountain Broadcasting Co., Inc.*, 60 FCC 2d 342 (1976); *Eastminster Broadcasting Corp.*, 58 FCC 2d 24 (1976), *aff'd mem.*, U.S. Court of Appeals Case No. 76-1792 (D.C. Cir. June 8, 1977); and *Wharton Communications, Inc.*, 44 FCC 2d 489 (1973).

14. In view of the protracted and flagrant fraudulent billing which occurred at WLLE, the effectuation of prohibited practices by principals of WLLE, and the almost total abdication of licensee responsibility demonstrated by this record, we must disagree with the ALJ's determination that the imposition of a forfeiture is a sufficient sanction by reason of certain mitigating factors.

These factors were: Hankin made restitution when he became aware of the double billing; Hankin took numerous measures to prevent any further incidents of fraduluent billing; and finally, Hankin cooperated with the Commission during the investigation, although it was noted that such cooperation occurred only once the fraudulent behavior had been uncovered by Gulf.[9] The Judge also held that Hankin appeared to understand his responsibilities as a licensee and had made clear his willingness to assure future compliance with the Commission's rules and regulations.

15. It is true that WLLE made restitution to Gulf Oil and to the non-Gulf Oil accounts. However such restitution occurred only once Gulf Oil had made an investigation and WLLE realized that its license was in jeopardy. Restitution, in these circumstances does not mitigate the wrongdoing. *White Mountain Broadcasting Co., Inc.*, 60 FCC 2d 342 (1976). Likewise, WLLE's institution of measures to prevent any further fraudulent billing -- hiring new personnel, billing from the program logs, having independent evaluations to determine if program logs are accurate, having Hankin directly supervise traffic and

[9] The allegations of fraudulent billing by WLLE were raised, in part, on April 4, 1973, when an attorney for the Gulf Oil Corporation contacted the Commission contending that a conspiracy existed between one of Gulf's employees and a person (or persons) employed by WLLE to defraud Gulf in connection with Gulf's cooperative advertising plan. An investigation ensued by the Commission between April 4 and April 10, 1973. Gulf Oil had commenced its investigation during the latter part of February, 1973 and its investigators were at the station on March 7, 1973. Dulaney was aware of the investigation by Gulf Oil but Hankin asserts he did not learn of the possibility of fraudulent billing until March 30, 1973. By letter dated April 6, 1973, counsel for WLLE advised the Commission of the rule violations.

billing, and hiring outside experts to evaluate the billing pattern -- is not a mitigating factor in that the licensee must be judged primarily by its past conduct. See *Wharton Communications, Inc.*, 44 FCC 2d 489 (1973). Finally, cooperation by the licensee, once the violations have been discovered by the Commission, does not mitigate against the seriousness of such misconduct. *Monroe Broadcasters, Inc.*, 60 FCC 2d 792 (1976). The minimum to be expected of all licensees is that they do not engage in fraudulent billing, that they take appropriate measures to guard against fraudulent billing by their employees, and that, in the event fraudulent billing nevertheless occurs, they make restitution and cooperate with Commission investigators.

16. In support of his holding that mitigating circumstances justified the imposition of only a forfeiture, the ALJ cited *Gateway Broadcasting Enterprises, Inc.*, 58 FCC 2d 63 (1976) and *Blackstone Broadcasting Corp.*, 52 FCC 2d 1106 (1975). WLLE argues not only that there were mitigating circumstances but also that WLLE's violations were comparable in degree to other fraudulent billing violations which were not sufficiently serious to justify termination of the station's license. In support of these contentions, WLLE relied on *Blackstone* as well as *Bluegrass Broadcasting Co., Inc.*, 43 FCC 2d 990 (1973) and *KCBQ, Inc.*, 43 FCC 2d 1269, FCC 73-1316 (letter of the Commission, December 12, 1973). Due to factual differences, however, those cases cited are clearly distinguishable from the instant case.

17. In *Gateway*, only one account was involved. Due to the incorrect affidavits showing charges of $6,466.38, the advertiser collected approximately $3,088.80 from the co-op supplier although he actually paid only $1,080 to the station. The seriousness of this violation was mitigated because the principal of the licensee and the advertiser, who were brothers, both believed, in good faith, although erroneously, that the affidavits were accurate and that the advertiser was entitled to the reimbursement resulting therefrom. The Commission held, therefore, that there was no such lack of responsibility as to require disqualification and imposed a $10,000 forfeiture. In the instant case, the principals did not act in good faith. The double billing in *Blackstone* involved the issuance of double invoices to only two accounts. The extra co-op credits received by the advertiser were nominal and the Commission therefore ordered only an $8,000 forfeiture. The instant case involved far more egregious violations because of the large number of accounts involved as well as the total amount the accounts were overbilled. *Bluegrass* is also inapposite. In that case, the licensee relied on the unblemished thirteen year record of the station manager. The Commission found that the "aberrational acts" of the station manager in overbilling accounts approximately $36,000 could not reasonably have been anticipated by the licensee. Therefore, the Commission determined that the appropriate sanction was a short-term renewal of one year. The instant case represents a situation not only where there was failure to institute sufficient safeguards against fraudulent billing by employees, but where one principal was instrumental in initiating the prohibited procedure and another principal either had actual knowledge or failed to learn of the employees' misconduct only because of intolerable

lack of supervision over station affairs. Like *Bluegrass*, *KCBQ* presents a different fact situation than the case at hand. In *KCBQ* the licensee came forward and voluntarily disclosed to the Commission that fraudulent billing had occurred at the station and that it was making restitution. It appeared that, unknown to the directors, officers, and other top level personnel, fraudulent billing had been undertaken by the general manager, resulting in substantial overpayments by national and local advertisers. In the instant case, Gulf Oil, not Hankin, brought the violations to the attention of the Commission. Thereafter Hankin did disclose the full extent of the fraudulent billing and made restitution. However, he did so only after Gulf Oil and the Commission had conducted investigations, at which point he knew that WLLE's license was in jeopardy.

18. *Empire Broadcasting Corp.*, 63 FCC 2d 634 (1977), represents a recent case wherein the Commission decided that a $9,000 forfeiture combined with a short-term renewal was a sufficient sanction for fraudulent billing violations. However, there are substantial factual differences between *Empire* and the instant case, which is the basis for our dissimilar treatment of the licensees. In *Empire* no principal of the licensee participated in the issuance of false affidavits. Only two of the station's 91 accounts were fraudulently billed and the 38 false affidavits issued represented only a small proportion of the 1000-1500 affidavits issued during the same time period. Thus, the violations resulted from negligence, not active indifference or intolerable irresponsibility on the part of the licensee. No comparable situation exists with respect to WLLE. Here, the fraudulent billing occurred in connection with 120 of the station's 138 non-Gulf Oil accounts and 9 of its Gulf Oil accounts,

and the number of false bills issued was so great in proportion to the total that the discrepancies could not possibly have been overlooked. Moreover, as we previously stated, the licensee in the instant case was not guilty of mere negligence but of gross negligence and inexcusable lack of supervision which was tantamount to an abdication of licensee responsibility.

19. For the reasons set forth herein, we conclude that the continued operation of the station by WLLE would be inconsistent with the public interest and that its station license must be revoked.

20. ACCORDINGLY, IT IS ORDERED, That pursuant to Sections 312(a)(2) and 312(a)(4) of the Communications Act of 1934, as amended, the broadcast license of WLLE, Incorporated for Station WLLE at Raleigh, North Carolina IS REVOKED.

21. IT IS FURTHER ORDERED, That WLLE, Incorporated IS AUTHORIZED to continue to operate the station until 12:01 a.m., October 23, 1977 to enable the licensee to wind up its affairs; PROVIDED, HOWEVER, that if the licensee seeks judicial review of our Decision, it is authorized to continue to operate the station until thirty (30) days after the court which has jurisdiction to review this proceeding issues its mandate.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

Secretary

APPENDIX

Rulings on Exceptions to the Initial Decision Exceptions of the Broadcast Bureau to the Findings of Fact and Conclusions of Law

Exception No.	*Ruling*
1	*GRANTED* to the extent shown in our Decision. See footnote 8; *DENIED* in all other respects as decisionally insignificant.
2	*DENIED*. Decisionally insignificant because in either case the affidavits were incorrect, and Hankin should have discovered this by comparing them to the program logs.
3a-3i	*GRANTED* to the extent shown in our Decision. See footnote 7; *DENIED* in all other respects as decisionally insignificant.
4, 5, 6, 10, 12b - 12e, 13, 14, 15	*DENIED*. Decisionally insignificant.
7	*GRANTED*. The record indicates that it was Daughtry rather than Hankin who marked the invoices "paid".
8	*GRANTED* in part and *DENIED* in part. WLLE issued bills to Gulf Oil which recited that nine local Gulf dealers had been billed and had paid for the advertising broadcast. However, the total of the bills so marked "paid" was $33,904.50 and not $33,394.50. In addition, the figure represents only the amount billed by WLLE to Gulf Oil but not the amount Gulf Oil actually paid.

Exception No.	*Ruling*
9a - 9d	*GRANTED* to the extent shown in our Decision; *DENIED* in all other respects as decisionally insignificant.
11	*GRANTED*. The record evidence adequately supports this exception and it is consistent with paragraph 47 of the I.D. and paragraph 9 of our decision.
12a	*GRANTED*. Undisputed evidence establishes the accuracy of the amounts billed and paid on behalf of each of the nine local Gulf dealers. See paragraphs 6 and 9 of our Decision with respect to the bills prepared by Hankin and payments made by Gulf Oil.
16	*DENIED*. We agree with the ALJ's conclusion but we disagree that there are such "other considerations" which would justify a sanction other than revocation.
17	*GRANTED* for the reasons set forth in our Decision.
18	*GRANTED*. We have ordered revocation.

Exceptions of WLLE, Incorporated to the Findings of Fact

Exception No.	*Ruling*
1	*DENIED* because the ALJ did find that Hankin retained overall responsibility for the station (paragraph 6) and that he

Exception No.	*Ruling*
	handled the billing (paragraphs 9 and 12) and in all other respects the exception is decisionally insignificant.
2, 9	*DENIED* for failure to comply with Section 1.277 of the Commission's Rules.
3	*DENIED* in substance. While the I.D. reflects the fact that Hankin personally did the bookkeeping and billing and may have had the sole responsibility and authority, this does not demonstrate, as this exception implies, that he effectively retained control over the overall operation of the station or over financial matters and the record does not support such a finding.
4	*DENIED*. The ALJ adequately portrayed Dulaney's responsibilities at the station and the additional facts presented by WLLE are decisionally insignificant.
5, 7, 18, 19, 21, 22, 23, 24, 25, 26, 28, 30, 32	*DENIED*. Decisionally insignificant.
6	*DENIED*. The ALJ's finding that Daughtry did not discuss her work with Hankin is supported by the record; *DENIED* in all other respects as decisionally insignificant.
8	*DENIED* in substance. Whatever the reasons that Daughtry prepared incorrect documents, and whether or not she in-

Exception No.	*Ruling*
	formed Hankin of that fact, he either knew or should have known of the fraudulent billing for the reasons indicated in our Decision.
10	*DENIED*. The finding of the ALJ describes Gulf Oil's cooperative advertising plan and is supported by the record evidence. The fact that the plan was not carried out as intended by Gulf was discussed elsewhere by the ALJ.
11	*GRANTED* to the extent that the invoices submitted to Gulf were not marked "paid" nor submitted by Hankin, and to the extent indicated in the Decision; *DENIED* to the extent that the requested finding regarding Hankin's participation or knowledge is not warranted since there is evidence of record indicating that Hankin either knew of, or should have known of the fradulent billing; and *DENIED* in all other respects as decisionally insignificant.
12	*DENIED* as decisionally insignificant because even though the checks from Gulf were made payable to the dealers, they were endorsed to WLLE by the dealers.
13	*GRANTED* to the extent indicated in our Decision, paragraph 10; *DENIED* in all other respects as decisionally insignificant.
14	*DENIED*. The ALJ did find that Walker worked for Gulf and that Walker and Dulaney initiated the cooperative advertising arrangements which were fraudulent; *DENIED* in all other respects as decisionally insignificant.

Exception No.	*Ruling*
15, 16, 17	*DENIED* as decisionally insignificant. However Dulaney and Walker met, however the fraudulent billing scheme developed between them, and whether it was Dulaney or Walker who instructed Daughtry, Hankin, as well as Dulaney, was ultimately responsible for the violations, for the reasons set forth in our Decision.
20	*GRANTED* to the extent indicated in our Decision, paragraphs 6 and 10; *DENIED* in all other respects as decisionally insignificant.
27	*GRANTED* to the extent indicated in the Decision; *DENIED* to the extent it is implied that WLLE did not submit or was not responsible for the affidavits-invoices issued to Gulf.
29	*GRANTED* to the extent indicated in our Decision, footnote 9; *DENIED* with regard to the requested finding that Hankin first became aware on March 30, 1973 that WLLE might be involved in fraudulent billing because the record evidence indicates that he may have known before that date; *DENIED* in all other respects as decisionally insignificant.
31	*DENIED*. The finding of the ALJ is adequately supported by the record evidence.

33, 34 *DENIED* in substance. Although there may have been a lack of direct communications between Hankin and certain employees, it does not excuse him from being held responsible for the fraudulent billing violations along with Dulaney, for the reasons that we have set forth in our Decision.

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Revocation of the License of

WLLE, INCORPORATED (WLLE)
Raleigh, North Carolina

DOCKET No. 19908

(Insert parentheses to right of the above, docket no. further right.)

Appearances

E. Stratford Smith, Vincent A. Pepper, Arthur V. Weinberg and *John E. Fiorini III* of Smith and Pepper on behalf of WLLE, Inc. and *John T. Kelly* and *Robert A. Zauner* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION
OF
ADMINISTRATIVE LAW JUDGE ERNEST NASH
Issued: March 22, 1976; Released: March 25, 1976

Preliminary Statement

1. WLLE, Inc. was directed by an Order released December 21, 1973 to show cause why its license for AM broadcast station WLLE, Raleigh, North Carolina should not be revoked. As an alternative to revocation, the Order also provided for a determination as to whether or not a forfeiture in the amount of $10,000 or less should be issued if the record did not warrant revocation of the broadcast license. In its Order the Commission specified that the proceeding inquire into the following issues:

(a) To determine all of the facts and circumstances with respect to the licensee's advertising practices

and, in light of the facts adduced, to determine whether its practices involved the use of any fraudulent schemes.

(b) To determine whether, and if so, the extent to which the licensee engaged in fraudulent billing practices in the operation of Station WLLE in violation of Section 73.1205 of the Commission's Rules.

(c) To determine whether, in light of the information giving rise to the preceding issues, if found to be true, the licensee possesses the requisite qualifications to remain a licensee of the Commission.

2. Section 312(b) of the Communications Act of 1934, as amended, provides that the burden of proof in a proceeding such as this should be upon the Chief of the Broadcast Bureau. The Commission also specified that the Notice of Apparent Liability which was to serve as the basis of a monetary forfeiture rather than revocation of the license was not to be taken in any way to be a predetermination of the conclusions to be reached in this proceeding.

3. The Chief of the Broadcast Bureau was directed to serve a Bill of Particulars upon the respondent. WLLE, Inc. was directed to appear and give evidence at a hearing to be held on the designated issues. A Bill of Particulars which gave details of the violations which were the basis of the Commission's Order to Show Cause was served upon WLLE in accordance with the requirements of the Commission's Order.

4. A prehearing conference was duly convened on January 30, 1974 and a date for commencement of hearings in this proceeding was set. This hearing date and subsequent dates had to be postponed because of the misfortune of the accidental death of the young son of the principal owner of the respondent corporation and be-

cause of illness of a principal witness for the Broadcast Bureau. Hearings were begun in Raleigh, North Carolina on December 10, 1974 and continued through December 13, 1974. They were reconvened in Raleigh on January 27, 1975 and the hearing in Raleigh was finally concluded on January 31, 1975. Additional hearing sessions were held in Washington, D.C. on March 4 through 6, 1975. Conferences were held on April 28, 1975 and November 14, 1975. The record was finally closed on November 14, 1975. Proposed Findings of Fact and Reply Findings were filed by the respondent and the Chief of the Broadcast Bureau on about December 8, 1975 and January 30, 1976, respectively.

Findings of Fact

5. WLLE, Inc., the respondent in this proceeding, acquired the license of broadcast station WLLE, Raleigh, North Carolina in 1965. WLLE is a daytime station broadcasting a "black appeal" format. Principal stockholder of WLLE, Inc. is and has been Wallace Hankin. Hankin owns almost 60 percent of the stock of the licensee. Associated with Hankin in the ownership of the respondent corporation are John F. Cussen and Wendell R. Barney, each of whom owns under 20 percent of the stock. These three individuals have had an ownership interest in the respondent since 1965 when WLLE was acquired. Hankin, as president and principal owner of the respondent corporation, has been active in the management and operation of station WLLE. Cussen, who is an investment banker, and Barney, who is retired, have never been active in the management or operation of the radio station. In 1971 the principal owners made available to James H. Dulaney a five percent stock interest in the respondent.

6. Hankin, who since 1965 has been in charge of station WLLE and also actively involved in the day-to-day operation, has been a licensee of the Commission for about 17 years. He began his active career in broadcasting in 1948 as an announcer at station WNBO in Auburn, New York. In 1950 he moved to station WGH in Newport News, Virginia as an announcer and assistant in the programming department. Three years later he moved to Winchester, Virginia where he worked at station WINC as an announcer and salesman. Four years later, he moved on to station WAGE in Leesburg, Virginia where he was station manager until the station was sold about one and a half years later. In 1960, together with four associates, Hankin organized the Allegheny County Broadcasting Corporation which acquired the license of station WCUM, Cumberland, Maryland. Hankin remained in Cumberland for about five years as a one-third owner, president, director and general manager of the radio station. After this station in Cumberland was sold in 1965, Hankin moved to Raleigh, North Carolina and, together with Cussen and Barney, acquired WLLE.

7. In the course of his career as a broadcaster, Hankin became aware of the Commission's policies forbidding such practices as false billing and double billing. Hankin received the Commission's Public Notice of May 15, 1970 *In re Applicability of Fraudulent Billing Rules*, 23 FCC 2d 303. He discussed this Public Notice with his station manager on the occasion of its receipt and thereafter.

8. Beginning in 1965 when WLLE was acquired by Hankin and his associates until the time of the hearing in this proceeding, Hankin was involved in the day-to-day operation of the station. He was at the station every day from 9:00 in the morning until about 1:00 p.m.,

except during billing periods when he would be at the station all day. Hankin's office was located off the main room of the station offices about 10-12 feet to the rear of the front entrance. His office door was generally open and he could see the desk of the station's traffic manager, Mrs. Barbara Daughtry, which was located near the entrance to the main room.

9. Hankin delegated management of the station to Dulaney who was the station manager. However, Hankin prepared station bills to be sent to advertisers. Hankin had given Mrs. Daughtry instructions as to the preparation of the station logs but he prepared the bills from "start order" forms prepared by Mrs. Daughtry. Although sales contracts were placed on Hankin's desk, and he was seen to have looked at them from time-to-time, he claims that he did not use the contracts as a basis for preparing bills. Neither did he review or have any procedures for reviewing sales contracts with a view toward insuring that the number of commercial announcements sold agreed with the actual number of commercial announcements broadcast over the station. Hankin assumed this to be a responsibility of the traffic manager, Mrs. Daughtry. According to Hankin Mrs. Daughtry was given the authority to tell any station salesman to limit the sales of commercial announcements if she could no longer schedule announcements within the guidelines established by management for the station. According to Hankin he relied on the start orders prepared by Daughtry exclusively in preparing bills. Although he had given instructions to Daughtry as to how to prepare program logs in 1970, he did not thereafter review her preparation of the logs to assure accurate scheduling of commercial time purchased by advertisers. Hankin had some uncertainty as to how Daughtry prepared logs.

10. Hankin let Daughtry prepare affidavits of performance without checking their accuracy as reflected by the actual programming set out in the program logs. Hankin felt that no such check was necessary because he had instructed Daughtry to prepare these affidavits from the program logs and from time-to-time had observed her preparing these affidavits by taking information from the logs. Hankin did check to assure that the number of announcements specified in the affidavits of performance conformed to the number of announcements specified in the accompanying bill.

11. Prior to 1971, it had been Hankin's practice to accompany Dulaney on sales calls to local advertisers. He discontinued this practice on a regular basis sometime in the latter part of 1971 because he felt it was unnecessary for both him and Dulaney to make sales calls. He did accompany Dulaney on calls to Gulf Oil dealers from time-to-time. Hankin, in a few instances signed sales contracts on behalf of WLLE.

12. In the latter part of 1971, almost all sales responsibility was turned over to Dulaney. A reason for this, according to Hankin, was that the billing and accounting of WLLE had grown to a point requiring his personal supervision. Hankin in 1971 discontinued the services of a part-time bookkeeper who had been handling WLLE's books from her home and started doing the billing from his office at the station.

13. When Hankin and his associates took over station WLLE in 1965, virtually all executive positions at the station were held by whites. Hankin and his associates, who are white, continued the "black appeal" format but restaffed the station filling management positions with blacks.

14. Dulaney impressed Hankin so much that he was rapidly promoted and was finally made station manager with responsibility for supervision of the sale of time to local advertisers and supervision of the station's traffic, air and broadcast personnel. About May of 1971, Hankin and his associates decided that Dulaney should have an ownership interest. Dulaney was sold a five percent stock interest in the station at the nominal cost of $500.00. During the period of Dulaney's employment, beginning 1966 through 1973, station earnings improved continuously. Dulaney's employment was terminated on about May 9, 1973, about a month after the Commission's investigation which uncovered instances of double billing and other fraudulent billing practices.

15. Dulaney was given full control over station employees and he was reported to have told station employees that he was the boss and told them this in the presence of Hankin, who did not contradict Dulaney's claim. Employees were instructed by Dulaney not to bother Hankin about any problems concerning their work. Hankin made it clear to WLLE's employees when they were hired that Dulaney had authority to direct them and that they should report to Dulaney. Hankin, during the time Dulaney was in charge of the station, never took it upon himself to inquire of any employees concerning Dulaney's supervision over them or regarding any employee's job or difficulties which any employee might have in carrying out his duties. Barbara Daughtry, the traffic manager, worked under Dulaney's direct supervision.

16. Station WLLE had had some correspondence with the Federal Communications Commission regarding the extent of commercialization during the station's broadcast time. Beginning about 1970 and through March

1973 Dulaney from time-to-time instructed Daughtry either to delete or not to enter commercial announcements on the station program logs. Dulaney gave these instructions to assure that the amount of commercial time broadcast did not exceed guidelines established by the station. These guidelines had been established, to avoid overcommercialization, in response to questions raised by the Federal Communications Commission. Commercials dropped from the station programming were not subsequently rescheduled.

17. According to Dulaney, he never discussed these particular matters with Hankin. According to Dulaney, all he meant to do was to instruct Daughtry to delete what he considered free or bonus announcements which the station had been giving away. Dulaney claimed that although he was general manager, he did not concern himself with record keeping functions such as start orders, program logs, and customer accounts. According to Dulaney, his only concerns involved sales and collections from local accounts.

18. Mrs. Barbara Daughtry was traffic manager at station WLLE from 1968 until 1973. Her duties involved preparation of start orders, program logs and affidavits of performance. She prepared start orders either from information given to her by station time salesmen or from advertiser contracts. A start order was a form which contained the name and address of the advertiser; the beginning and termination date of the period during which the advertiser's commercial material was to be broadcast; the number and duration of the commercial announcements to be broadcast each day; and the total contract amount. Daughtry kept the original of each start order and placed the copy on Hankin's desk. If she prepared the start order from a written contract,

she would also put the contract on Hankin's desk when she was through with it.

19. Daughtry saw Hankin every day and spoke with him. She did not discuss her work with Hankin. As far as she was concerned, Dulaney was boss at WLLE and she worked for him. Hankin never said or did anything to disabuse her of this notion.

20. Commercial announcements were broadcast if they were entered on the program logs. Program logs were prepared by Daughtry sometimes with the assistance of Patricia Ann Brymer, who worked at WLLE as a secretary-receptionist for about six months in 1973. Either Daughtry or Brymer would schedule commercial announcements by insertion in appropriate places in the program logs. According to Daughtry, she had been instructed by Hankin to schedule no more than 18 minutes of commercial announcements during non-drive time and no more than 20-22 minutes during drive time.

21. Problems arose regarding the scheduling of commercials on the program logs. These problems were a combination of factors, the most important of which, was the station policy to limit the total number of commercials within specified guidelines. There was also the need for 15 minutes separation between commercials involving competing businesses. In logging commercials Daughtry also had to contend with the desire of some advertisers to be scheduled during the morning and evening drive times. Finally, Daughtry had to contend with a workload which operated as a distracting factor when it came to assuring that commercial announcements were properly scheduled.

22. Daughtry deleted commercial announcements from program logs or omitted announcements in keeping

with Dulaney's instructions. Daughtry would, on her own initiative, sometimes omit entry of commercial announcements, which had been contracted by advertisers, from program logs when the broadcast of such announcements would result in excessive commercialization. Brymer, on instructions from Daughtry, would also omit commercial announcements from program logs when sales exceeded the number of announcements that could be scheduled under station guidelines.

23. Hankin denied that he knew of the instructions Dulaney gave Daughtry to delete or not enter commercial material on the logs. According to Hankin, he did not become aware of this practice until he learned of it from the Commission's investigation of the station.

24. Daughtry prepared affidavits of performance on the basis of the start orders rather than the station logs. In those cases in which not all contracted commercials were entered into the logs, the affidavits or performance would be false. According to Daughtry, she did this pursuant to Dulaney's instructions and was under the impression that Hankin was in agreement with the procedures. Hankin denied any knowledge of this procedure. He did not know how Daughtry got the impression that he was aware that she was preparing affidavits that did not accurately reflect the actual number of commercials logged and broadcast.

25. Station salesmen would occasionally ask Daughtry whether or not commercials they had sold were being logged. These salesmen were also under instructions not to discuss their work problems with Hankin but to talk only with Dulaney. According to the salesmen, Dulaney's word was law so far as the employees of WLLE were concerned. Nevertheless, there was contact between Hankin and the employees at WLLE. He was present at

the office every day and the door of his office was generally open. One employee, Bobby Rogers, once asked Hankin for a loan for personal purposes and when Hankin mentioned this to Dulaney, according to Rogers, Dulaney really chewed him out.

26. Any salesmen who questioned Daughtry about advertising schedules was referred to Dulaney who told them not to worry. Salesmen who became aware of the failure to log commercials that they had sold either by getting the information from Daughtry or by checking the program logs themselves did not report the situation to Hankin. They had received instructions from Dulaney not to talk to Hankin about their work. In some instances, salesmen who knew that commercials were not being logged would not take the matter up with Dulaney for fear of losing their jobs.

27. Fraudulent over-billing of local advertisers of WLLE during the two-year period from April 1971 to March 1973 came to about $68,000. Evidence introduced at the hearing based upon reimbursement of advertisers once the false billing had been discovered reflect the very considerable extent to which the practice went on. An analysis submitted by the Broadcast Bureau summarized the extent of the false billing as follows:

Billing Analysis of WLLE

(1) Date Affidavits of Performance Issued	(2) Period for which Affidavits Issued	(3) Amount Billed on Invoices	(4) Number of Spots on Affidavits	(5) Spots broadcast as per Computer Run	(6) Spots billed but Not Broadcast
Bank of N.C.					
2/ 1/72	Jan. 1972	$200.00	260	65	195
3/ 1/72	Feb.	$200.00	250	61	189
4/ 3/72	Mar. Apr.	$200.00	270	57	213
6/ 1/72	May	$200.00	270	32	238
7/ 3/72	Jun.	$200.00	260	38	222
8/ 1/72	Jul.	$200.00	260	40	220
9/ 1/72	Aug.	$200.00	270	39	231
10/ 2/72	Sept.	$200.00	260	28	232
11/ 1/72	Oct.	$200.00	260	29	231
12/ 1/72	Nov.	$200.00	260	16	244
1/ 1/73	Dec.	$200.00	260	31	229
Total			2880	436	2444
Gallo Wine					
2/ 1/72	Jan. 1972	$400.00	520	65	455
3/ 1/72	Feb.	$400.00	500	56	444
4/ 3/72	Mar.	$500.00	540	55	485
5/ 1/72	Apr.	$400.00	500	60	440

6/ 1/72	May	$400.00	540	65	475
7/ 3/72	Jun.	$400.00	434	84	350
8/ 1/72	Jul.	$500.00	433	95	338
9/ 1/72	Aug.	$400.00	450	94	356
10/ 2/72	Sept.	$400.00	434	74	360
11/ 1/72	Oct.	$500.00	432	66	366
12/ 1/72	Nov.	$400.00	434	43	391
1/ 1/73	Dec.	$500.00	434	17	417
2/ 1/73	Jan. 1973	$400.00	449	56	393
2/26/73	Feb.	$450.00	400	25	375
Total			6500	855	5645
O'Neil Motors					
7/ 3/72	Jun. 1972	$300.00	300	108	192
8/ 1/72	Jul.	$300.00	310	121	189
9/ 1/72	Aug.	$300.00	310	92	218
10/ 2/72	Sept.	$300.00	300	71	229
10/31/72	Oct.	$300.00	300	74	226
12/ 1/72	Nov.	$300.00	300	43	257
1/ 1/73	Dec.	$300.00	310	44	266
2/ 1/73	Jan. 1973	$300.00	310	70	240
2/26/73	Feb.	$300.00	280	57	223
4/ 1/73	Mar.	$300.00	310	75	235
Total			3030	755	2275

Sears					
2/ 1/72	Jan. 1972	$207.20	74	53	21
3/ 1/72	Feb.	$389.20	139	128	11
4/ 3/72	Mar.	$525.00	190	156	34
5/ 1/72	Apr.	$170.80	61	57	4
6/ 1/72	May	$565.50	202	160	42
7/ 3/72	Jun.	$515.20	184	127	57
8/ 1/72	Jul.	$632.80	226	178	48
9/ 1/72	Aug.	$411.60	147	107	40
10/ 2/72	Sept.	$310.80	111	98	13
11/ 1/72	Oct.	$291.20	104	98	6
12/ 1/72	Nov.	$450.80	161	57	104
1/ 1/73	Dec.	$232.40	83	61	22
2/ 1/73	Jan. 1973	$257.60	92	72	20
2/26/73	Feb.	$176.40	63	74	-11
4/ 1/73	Mar.	$257.60	92	89	3
	Total		1929	1515	414

28. Hankin prepared bills from start orders. He never checked the bills against the program logs to be sure that advertisers were not being overcharged. Where Daughtry or, on occasion, Brymer prepared affidavits of performance, these affidavits were often false either in that they did not accurately reflect the time the commercial had been broadcast or reflected commercial matter which had never been broadcast at all. Daughtry gave the affidavits of performance to Hankin. Hankin never questioned the accuracy of the affidavits. When required, the affidavits of performance were sent to the advertiser together with the bill that Hankin had prepared.

29. Gulf Oil Corporation had a cooperative advertising program involving its independent dealers in the Raleigh, North Carolina area. By the terms of the arrangement certain advertising which the dealers bought on local radio stations would entitle them to a refund of 50 percent of the cost from Gulf Oil. Gulf had a local representative or retail marketer who served as liaison between the corporation and the Raleigh gas station dealers. The marketer sought to encourage gas station operators to increase their sales of tires, batteries and accessories. The marketer also counselled gas station dealers regarding such matters as financial management, sales, upkeep and appearances of their gas stations and advertising in order to take advantage of the Gulf Oil cooperative advertising arrangement.

30. Dealers would submit advertising proposals through the retail marketer. Once the proposal was approved by the appropriate officials of Gulf Oil, the gas station operator would be able to purchase the advertising time on radio station WLLE. After the dealer had paid for the time he would submit the paid bill, together with an affidavit of performance, to the corpo-

ration which would then reimburse him for one half of the advertising cost.

31. During a period beginning about August 1972 through February 1973, there was a continuous pattern involving eight or nine Gulf Oil station dealers by which reimbursements were obtained from Gulf Oil for advertising of Gulf products on station WLLE through the use of false invoices and affidavits. Instead of paying 50 percent of the cost of WLLE advertising, Gulf Oil Corporation was paying all of the cost.

32. Involved in the double billing scheme were William O. Walker, who was the retail marketer for the Raleigh area, and Dulaney. Dulaney met Walker shortly after he came to Raleigh to take the job as retail marketer.

33. Walker is a young man who went to work for Gulf Oil after graduation from college. He came to Raleigh sometime after his completion of the company training program. Walker had some idea as to what was involved in Gulf Oil's cooperative advertising program from his previous work and training in the corporation. Dulaney and Walker, between them, worked out a plan whereby the local gas station operators could advertise on WLLE without cost to the dealers and with the entire cost of the advertising being paid by the corporation.

34. Daughtry was instructed regarding the paper work necessary to take advantage of Gulf Oil's advertising program. Advertising proposals were prepared, signed by the respective retail dealers and submitted to Gulf Oil by Walker. Once the proposals were approved advertising contracts were executed by the Gulf dealers and station WLLE. After the commercials were presumably broadcast bills which were prepared and marked paid by Hankin, together with affidavits of performance, were

submitted to Gulf Oil through Walker. Checks from Gulf Oil for one half of the amount billed were then sent to the dealers.

35. In almost all cases, the dealers would then endorse the checks which were picked up by Dulaney and deposited to WLLE's bank account by either Hankin or Daughtry. There is some dispute in the testimony of the various individuals concerned as to who gave instructions to whom and as to who initiated the various steps which were taken, but there is no dispute that WLLE ran a considerable number of commercial announcements on behalf of the Gulf dealers in the Raleigh area for which they received reimbursement from the Gulf Oil Corporation without the dealers paying anything except for occasional tradeouts.

36. In every instance the invoices which were marked paid and submitted to Gulf Oil for reimbursement were false in that they were not paid. These bills also overstated the number of announcements or the charge for the announcements. During the period from August to February these invoices were in a total amount in excess of $9,000 and Gulf Oil reimbursed its dealers in the amount of $4,500. This reimbursement by Gulf actually went to WLLE rather than to the dealers as intended.

37. Walker and Dulaney became close associates during this period. Hankin admits to having met Walker once or twice, but denies that he ever took part in the dealings between Gulf Oil and WLLE. Walker received payments from WLLE in the amount of $1,200, most of it in checks signed by Hankin.

38. Hankin testified that Dulaney introduced Walker to him in Hankin's office at station WLLE sometime in late summer 1972. According to Hankin, Dulaney

told him at this time that Walker was working with him in connection with the Gulf dealers to put more Gulf advertising on station WLLE. However, according to Hankin, Dulaney did not then, nor did anyone else thereafter, ever inform him that Walker was an employee of the Gulf Oil Corporation. Hankin claims that, on the occasion of the initial introduction to Walker and thereafter through March 1973, he believed that Walker was an employee of an independent distributor of Gulf products, the Carolina Fuel Oil Company.

39. Walker's office in Raleigh was located in what is called a "bulk plant" which also houses the Carolina Fuel Oil Company. Hankin testified that he passes the "bulk plant" each day on his way to and from station WLLE and that there was nothing about the "bulk plant" which indicated to him that it housed other than an independent distributor of Gulf products. Hankin further testified that, in his more than 25 years of dealing with radio station accounts, he has called on a number of "bulk plants" and all of them were operated through independent distributors. A representative of the Gulf Oil Corporation testified that it was Gulf's general practice to operate through independent distributors. Thus, in 46 areas in North Carolina, Gulf Oil Corporation operates through independent distributors. In four areas, however, Raleigh, Fayetteville, Charlotte and Greensboro, the distributor is company owned.

40. About nine Gulf dealers in the Raleigh area were involved in the double billing activities. Four of the nine Gulf dealers were called as witnesses in this proceeding. They were: (1) Joe G. Williford; (2) William Johns; (3) Eugene Johns; and (4) Clee F. Britt. A stipulation concerning the proposed testimony of two other Gulf dealers (John Austin of Woodard's and William Vargason

of Capital Gulf) was received. With the exception of Williford, none of the six Gulf dealers in question was acquainted with Hankin during the period which the fraudulent billing involving them, station WLLE and the Gulf Oil Corporation occurred. With respect to Williford, he recalls meeting Hankin two or three years before at a time when Hankin and Dulaney attempted to sell him advertising time over station WLLE. Williford believes he did not buy time then because Gulf Oil Corporation had not agreed to cooperative purchases of broadcast time. However, each of the Gulf dealers was acquainted with Walker and Dulaney during the period in question. Moreover, the arrangements and understandings with Walker and Dulaney by which each Gulf dealer came to participate in the fraudulent billing of the Gulf Oil Corporation were essentially similar.

41. Either Walker or Dulaney approached the Gulf dealer with an advertising program over WLLE. Each Gulf dealer was assured by Walker or Dulaney that the program in question would cost him nothing. Each Gulf dealer was informed that, once he received his cooperative advertising reimbursement check from the Gulf Oil Corporation, he should endorse the check and turn it over to Dulaney.

42. Dulaney required each Gulf dealer, with the exception of Clee Britt, to sign a sales contract on a WLLE letterhead. The amount in the sales contract would be the approximate or exact dollar amount that was eventually recited on the affidavit-invoices issued by station WLLE and submitted to the Gulf Oil Corporation. According to Dulaney, he required the contracts to be signed so that he (WLLE) could sue Gulf Oil Corporation if WLLE did not get its money.

43. Once a sales contract was signed by a Gulf dealer, it was given to Daughtry. Daughtry, according to Dulaney, had been instructed by him to prepare start orders on the basis of information in the sales contract. Dulaney further testified he instructed Daughtry that, in preparing the start orders, a total of 20 Gulf commercial announcements per day should be divided equally among the various Gulf dealers. However, according to Dulaney, he did not tell Daughtry what dollar amounts should be placed on the respective start orders for each Gulf dealer.

44. Daughtry testified that Dulaney or Walker told her what dollar amounts to place on the start orders. Her instruction was to insert half the dollar amount recited on the sales contract. Daughtry further testified that after she prepared start orders on behalf of the various Gulf dealers, she placed both the start orders and the sales contracts on Hankin's desk.

45. Hankin denies any awareness, prior to March 30, 1973, that station WLLE was engaged in fraudulent or otherwise improper billing of the Gulf Oil Corporation. He testified that, during the period August 1972 through February 1973, he prepared and mailed monthly bills to the various Gulf dealers. Hankin further testified that he prepared the bills based on information contained in the start orders prepared by Daughtry. Hankin claims that he did not review the sales contracts which were placed on his desk "unless he happened to glance at the top of one of the contracts."

46. Hankin admitted that he was aware, during the period August 1972 through February 1973, that the cost of advertising being billed the local Gulf dealers was subject to cooperative payment by Gulf Oil Corporation. Hankin testified that he sent two copies of each bill issued by him to the Gulf dealer. He assumed that the

Gulf dealer would submit one copy to the Gulf Oil Corporation in order to obtain cooperative advertising reimbursement. Hankin further admitted that he was aware, during the period October 1972 through February 1973, that he received payments on the accounts of the Gulf dealers in the form of Gulf Oil Corporation checks which were made out to the dealer and then endorsed to station WLLE. Hankin received at least 10 such checks and himself made the bookkeeping entries.

47. Hankin claims that the nature of payment (Gulf Oil Corporation check) and the amount of payment on the respective accounts of the Gulf dealers did not cause him to become aware, during the period October 1972 through February 1973, that fraudulent or otherwise improper billing of the Gulf Oil Corporation was taking place. With respect to the nature of payments by Gulf dealers, Hankin testified that as he received checks in payment on accounts, those checks were entered by him or by Daughtry on a deposit slip. The check itself would be deposited in WLLE's bank account and only a copy of the deposit slip retained. Thus, according to Hankin, he credited the accounts of the local Gulf dealers at the end of each month from deposit slips and not from the Gulf Oil Corporation checks.

48. Dulaney testified that toward the end of January 1973, he was having trouble collecting Gulf Oil Corporation checks from the Gulf dealers. According to Dulaney, Walker, the Gulf dealers or someone else was cashing the checks. Dulaney knew this because he had called the offices of the Gulf Oil Corporation in Charlotte, North Carolina, and learned from a Gulf official there that the requests for cooperative advertising reimbursement submitted by Walker were being approved and Gulf Oil checks issued to the dealers. According to Dulaney, one

of the Gulf dealers who wanted to keep a Gulf Oil Corporation check issued to him was Clee F. Britt. Dulaney testified that he paid Britt five one-hundred dollar bills to get the $675.00 Gulf Oil check. Britt disputed Dulaney's testimony and claimed that, as soon as the Gulf Oil Corporation check arrived, he called Dulaney who picked it up soon thereafter. Britt further testified that Dulaney gave him no money. Dulaney endorsed the Gulf Oil Corporation check issued to Britt and cashed it. Dulaney testified that he told Hankin to "write off" the amount ($700) owed WLLE by Clee's Gulf. However, according to Dulaney, he did not inform Hankin why the Clee's account was a "write off."

49. Hankin did not himself check at any time with any of the Gulf dealers as to why he was not paying his bill. According to Hankin, it was Dulaney's responsibility to contact accounts concerning balances due.

50. The Gulf Oil Corporation became aware of the fraudulent billing sometime during February 22-24, 1973. At about this time, Gulf Oil Corporation had transferred Walker from Raleigh to Fayetteville, North Carolina. Shortly after the transfer, a Gulf Oil employee, while inspecting Walker's files at his former office in Raleigh, discovered that the Gulf dealers in Raleigh were engaging in an inordinate amount of cooperative advertising with station WLLE and notified his superiors. As a result of this Gulf Oil Corporation began an investigation. Walker resigned from the Gulf Oil Corporation on or about February 26, 1973.

51. Hankin testified that it was not until the afternoon of March 30, 1973, that he became aware of the fact that WLLE might be involved in fraudulent billing of Gulf Oil. Hankin said he picked up the bills for the Gulf dealers, walked into Dulaney's office and there

threatened Dulaney that he was going to check personally with the Gulf dealers to find out what was wrong and why WLLE was not being paid. According to Hankin, it was then that Dulaney told him that he (Hankin) should not do that and that there was a problem with the bills. Hankin claims that Dulaney, at this time, was "vague and evasive" as to what the problem with Gulf bills was and said that Walker had done something wrong and that Walker was gone. Hankin testified that he did not find out definitely what was wrong until April 5, 1973 when he and his counsel met in Atlanta, Georgia with representatives of the Gulf Oil Corporation.

52. Shortly after Hankin became aware of the overbilling of the Gulf retailers, Hankin, together with J.R. Timmerman and Jack L. Sales, both of whom were representatives of Gulf, reviewed the WLLE, Inc. billing ledgers and the invoice-affidavits submitted to Gulf through Walker and concluded that the station had run advertising for Gulf worth $9,043.85 at applicable rates. Mr. Hankin, therefore, offered to refund to Gulf Oil Corporation $84.00, the difference between the value of the spots run and $9,128.25, the total amount collected from Gulf. He also offered to assist Gulf in determining the actual amount of advertising run for each retailer so that Gulf could collect from the dealers the amounts the dealers had been overpaid by Gulf. Gulf refused this offer contending that it had paid out $9,212.64 to its stations and that they would normally pay one half of that amount or $4,606.32. In order to effect a prompt settlement, WLLE, Inc. settled with Gulf on that basis. The service station retailers were not required by Gulf to reimburse Gulf. However, WLLE was required by Gulf, as a condition of obtaining a release from Gulf, to release Gulf and its dealers from any liability. In addition, the charges for between seven and eight hundred dollars in actual adver-

tising run by WLLE for Gulf in January and February of 1973, which had been billed but had not been paid were cancelled by mutual agreement. Accordingly, WLLE claims to have broadcast commercial advertising for Gulf dealers worth almost $10,000 for which it was compensated somewhat less than one half of that amount.

53. By letter dated April 6, 1973, counsel for WLLE advised the Commission of the discovery of the double billing of Gulf Oil Corporation. This was done immediately following Hankin's meeting on April 5, 1973, attended by counsel, at which Hankin first learned significant details concerning the double billing. On April 12, 1973, Hankin came to Washington, D.C. to explain in person to Commission personnel investigating the matter, what he knew about it and to submit to their questioning. He also arranged to bring Dulaney to Washington on April 15, 1973 for a similar interview with the Commission investigators. WLLE stipulated all of the facts the Commission requested necessary to establish the double billing, over-billing, and the extent thereof. Hankin states that he had furnished all documents requested by the Commission which he could locate and, to the best of his ability, answered all of the Commission's interrogatories.

54. After the billing irregularities were called to Hankin's attention by the Gulf Oil Corporation and the Federal Communications Commission, Hankin concluded that there was probably over-billing of accounts other than those involving Gulf Oil. He decided that the only way he could determine the full extent of the over-billing of accounts would be to conduct a complete survey by computer. He retained Automation Information Systems, Inc. and delivered the logs for the two-year period, April 1, 1971 through March 30, 1973, for comparison with the invoices and other billing data for this period.

55. Of 124 accounts surveyed 106 were found to have been billed for commercial announcements which had not been broadcast. This 106 included four accounts which had been identified by Commission investigators as having been falsely billed. Each account which had been over-billed was analyzed to determine what was owed to the advertiser in money or commercial announcements for the over-billing during this two-year period. These determinations were assembled in a report which was filed with the Commission on November 16, 1973. Included in the report were statements of the action being taken by the licensee to make restitution to the advertisers either by cash refund or makeup commerical broadcasts. A further report submitted to the Commission on November 26, 1974 listed 14 additional accounts which Hankin found had been over-billed.

56. Adjustments were made in virtually all accounts by negotiation with the individual advertiser and giving him either a refund for overcharges or makeup for commercial announcements. Hankin undertook to make restitution. He had found that thousands of individual announcements, for which charges had been made, were never broadcast. Restitution was made in the form of cash refunds to 31 accounts in the amount of $15,290.15 and makeup spots to a total value of $26,929.06 were accepted by the advertisers. About 5,000 additional spots were made good with no valuation placed on the announcements.

57. To assure future accuracy of billing, WLLE first set up a computer billing system from the logs utilizing a local computer service. However, the percentage of error ran as high as four percent which WLLE considered too high. New personnel were added at the station and the practice of manual counts was resumed in May of

1973. Under new procedures, preparation of start orders and scheduling of spots on the logs is done by one person. The count of spots from the logs for billing and the billing is done by other personnel. This prevents one person from controlling both the scheduling and the billing. With the method employed, each spot run on the logs is counted and entered in the accounts receivable ledger so that the basis of billing from the logs rather than the start orders as was the case prior to the discovery by WLLE of the fraudulent and improper billing. It is required that each contract and resultant start order carry a unit cost per spot. Bills are made out from the product of the count of spots from the accounts receivable ledger and the unit cost on the start order. This assures that no one will be billed for spots which did not run. In order to further minimize errors an initial count of spots on the logs is made before they go to the announcers for daily use and are recounted after the logs have been used.

58. An off-the-air monitor of one broadcast hour per day, selected randomly, performed by an outside source, is also taken seven days per week for comparison with the logs. Hankin receives these monitor reports and personally checks them against the logs. He also personally supervises the traffic and billing work and makes periodic checks to make certain that the required procedures are being followed.

59. Approximately a year after establishing the billing practices and procedures described above, WLLE retained a recognized expert in the field of statistics and sampling, Dr. Charles F. Proctor, and a certified public accountant, John F. Prescott, Jr., Raleigh, North Carolina, to perform a statistical analysis of the integrity of the revised billing procedures of WLLE, Inc. The objective was to estimate,

by an appropriate sampling of the billing ledgers, the ratio of spots run and billed correctly to the spots billed for a one-year test period from September 1973 through August 1974. Dr. Proctor prepared a sample designed to estimate the ratio of spots run to spots billed and proportions of errors in billing among spots billed. Using a sample of 40 account days which he had found to be adequate, Proctor calculated the coefficient of variation between the spots run and billed correctly to the number of spots billed to be .8 of one percent.

60. In view of Mrs. Daughtry's testimony that one of her reasons for deleting the commercial announcements from the logs was the need to comply with station guidelines limiting the amount of commercial broadcast time, Hankin also had an analysis made of the commercial content of the WLLE logs and the remaining commercial availabilities based on a standard of 18 commercial minutes per hour for the period commencing January 1, 1971 through March 30, 1973. This study showed that in no month of the 27 months included in the study did WLLE have less than 1,500 minutes of commercial availability unused (February 1973), and that in May of 1972 it had a high for the study period of 3,360 available minutes. In 1971, the lowest unused availability was 2,338 minutes in April and the highest 2,969 minutes in August. In 1972 the lowest month's remaining availability was 1,653 minutes in December and the highest 3,360 minutes in May.

61. *Dr. A. Huett Rhodes*. Rhodes is a surgeon who has practiced in Raleigh for 18 years. He is a Past President of the Wake County Medical Society. He has known Hankin between four and five years and knew him to be an owner of radio station WLLE. He has also known him socially. His personal opinion of Hankin's character

for truthfulness and veracity is that it is above reproach. His knowledge of Hankin's reputation for truth and veracity in the community is that it is also above reproach.

62. *Richard K. Helmhold*. Helmhold is a Ford dealer in Raleigh and was the former Mayor of the City of Apex, North Carolina. He is a Past President of the Ford Dealer's Association of the United States and Past President of the Wake County Chapter of the American Red Cross. At the time of the hearing, he was serving on the Board of Trustees of St. Augustine's College, a black college in Raleigh, North Carolina. He has known Hankin between six and eight years and was aware that he is an owner of radio station WLLE. He has known Hankin in both social and business capacities. His personal opinion of Hankin's character for truth and veracity is that it is impeccable. He also stated that he knew Hankin's reputation for truth and veracity in the community of Raleigh to be impeccable. Helmhold was a Ford dealer who advertised on WLLE and who did not receive the full number of commercial spots which he had ordered.

63. *Jyles Jackson Coggins*. Coggins is a general contractor, a real estate developer and is engaged in various small businesses in Raleigh. He served in the North Carolina House of Representatives as the representative from Wake County for two years. Coggins also served in the Senate of the State of North Carolina for a period of eight years. He had known Hankin for between six and eight years and is aware that he is one of the owners of radio station WLLE. He has known him in both a social and business context. He testified that his personal opinion of Hankin was that he was completely honest, dependable, of the highest integrity and an asset to the community. As to Hankin's reputation in the community for truthfulness and veracity, he has never heard of anyone

speak of Hankin in any other than a complimentary manner.

64. *Robert I. Rothstein*. Rothstein is a resident of Raleigh and is in the electrical and radio and television supply and equipment business. He is Secretary-Treasurer and part owner of Southeastern Radio Supply, with 19 locations in North Carolina and Virginia. He is a member of Rotary and has known Hankin approximately seven years and knew that he is an owner of WLLE. He knew him in both social and business contexts. His personal opinion as to Hankin's character with respect to truth and veracity was that it is excellent. He also testified that Hankin's reputation for truth and veracity in the Raleigh community was excellent.

65. *William E. Wollman*. Wollman, a resident of Raleigh for 35 years or more is engaged in the real estate business. He is the owner of a downtown office building and of an apartment complex. He has known Hankin for a period of 10 years and knows that Hankin is an owner of WLLE. He knows Hankin principally in a social manner and both of them are active in an art group. His personal opinion of Hankin's character for truth and veracity is very high. He has purchased art work with the advice of Hankin and found him knowledgeable and learned, with a high ethical standard. As to Hankin's reputation for truth and veracity in the community, he testified that Hankin is very well thought of and that he has never heard anything derogatory in any way. Hankin's truthfulness and veracity were the subject of discussions by the members of the above-mentioned art group because Hankin was "the main spearhead . . . the instigator or the originator of the idea [the art group]". The group had art objects of considerable value and had appraisals made by several different people which

confirmed Hankin's opinion. No one in the group questioned Hankin's reputation for truth and veracity and the discussion resulted only from the fact that the group was going into a field in which no one in the group had any knowledge except Hankin. Wollman had never advertised on WLLE.

66. *Tony A. Curran.* Curran is a resident of Cary, North Carolina and is a partner of Helmbold in Helmbold Ford. He is Vice President and General Manager of the Company. His personal opinion of the character of Hankin for truth and veracity is that it is "very excellent". His knowledge of Hankin's reputation for truth and veracity in the Raleigh community is also that it is "very excellent".

67. *Sam Ruby*. Ruby, a resident of Raleigh since 1935, is in the jewelry business in Raleigh. He has known Hankin eight or nine years in both social and business contexts. He is aware that Hankin is one of the owners of radio station WLLE. During the time he has known Hankin he has formed his own opinion of Hankin's character for truth and veracity as excellent. He states also that Hankin's reputation for truth and veracity in the community of Raleigh is excellent.

68. *Arthur W. German*, German, who is now a resident of Easton, Maryland, was engaged in radio broadcasting in Cumberland, Maryland at the same time that Hankin was a part owner and the general manager of WCUM in Cumberland and in this capacity was a competitor of Hankin's. German's personal opinion of Hankin's character for truth and veracity was that it was of the highest order. During the period which German knew Hankin in Cumberland, he had personal knowledge of his reputation for truth and veracity in the community and testified that it was never questioned.

Conclusions

1. WLLE, Inc. was engaged in extensive fraudulent billing during the period from sometime in 1971 until the end of March 1973. Its fraudulent billing consisted of double billing Gulf Oil Corporation accounts and billing various other advertisers for commercial announcements which were not broadcast.

2. From time to time, WLLE, Inc. sent out affidavits of performance to advertisers which certified to the broadcast commercials on certain days and at specified times. These affidavits were sent to advertisers with their bills and were intended as proof of performance in accordance with the contract or agreement the advertiser had with WLLE. Many of these affidavits were false in that, either the commercial announcements had not been broadcast at all, or had not been broadcast at the times specified in the affidavits.

3. WLLE submitted bills which were marked paid to a number of Gulf Oil service station owners. These bills had, in fact, not been paid. They were prepared in this form so that they could be submitted to the Gulf Oil Corporation by the service station owner who had a cooperative advertising arrangement with the Gulf Oil Corporation. Under the arrangement the service station owner was supposed to pay the bill for broadcast advertising and then submit the paid bill to Gulf Oil to obtain a rebate of one half of the amount of the bill. Actually, WLLE had an understanding with the service station owners that they would not have to pay anything for advertising Gulf products. Bills were marked paid in furtherance of a scheme by WLLE personnel acting in concert with a Gulf employee whereby the entire cost of the advertising was to be borne by the Gulf Oil Corporation.

4. Section 73.1205 of the Commission's Rules and Regulations provides that:

> No licensee of a standard, FM, or television broadcast station shall knowingly issue to any local, regional or national advertiser, advertising agency, station representative, manufacturer, distributor, jobber, or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such bill, invoice, affidavit or other document is issued, or which misrepresents the nature or content of such advertising, or which misrepresents the quantity of advertising actually broadcast (number or length of advertising messages) or the time of day or date at which it was broadcast. Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any documents which would violate this section if issued by the licensee.

This provision of the Commission's Rules was violated by WLLE, Inc. over a period of at least two years. This violation of the Rules encompassed thousands of comercial announcements and resulted in false billings amounting to several thousand dollars. There is no dispute by the respondent that the false billing did occur to the extent stated and for at least the period of time mentioned. Respondent's dispute relates to responsibility for these derelictions.

5. The admitted fraudulent billing engaged in by station WLLE, mainly involved Wallace Hankin, who is the principal owner of the licensee; James H. Dulaney, who started as a salesman and rose to the position of station manager wi h full supervisory authority over all employees and Barbara Daughtry, who held the title of

traffic manager, but was actually engaged in performing the clerical duties involved in the preparation of program logs, affidavits of performance and effectuation of station advertising contracts. William O. Walker, a former employee of Gulf Oil Corporation, was also involved in carrying out the procedures by which Gulf Oil Corporation was made to pay all instead of half of the bill for advertising its products on WLLE.

6. Hankin prepared station bills from start orders which were provided to him by Daughtry. Daughtry was supposed to enter the commercials called for by the start orders upon program logs. This would assure that the advertising was broadcast. Daughtry also prepared affidavits of performance when necessary to bill and collect from a particular advertiser. Daughtry and Hankin worked in reasonable proximity to each other. However, responsibility for supervising Daughtry was given to Dulaney. Hankin assumed that Daughtry was doing what she was supposed to be doing and did not himself try to confirm this fact from material available to him.

7. Hankin is an experienced broadcaster with many years in the industry. He is also an owner who is present on the premises of the broadcast station every day. All of the evidence points to the conclusion that in the exercise of reasonable diligence Hankin would have known of the deficiencies which were going on. We are bound to conclude that Hankin knew or should have known that the bills and affidavits of performance which he was sending out were in many instances fraudulent and in violation of the requirements of Section 73.1205 of the Commission's Rules.

8. We must conclude that Daughtry, to the extent that she performed acts which resulted in false or fraudulent billing, was acting at the direction of Dulaney. From

the evidence, it is also reasonable to conclude that Hankin should have known about these activities.

9. With reasonable diligence Hankin should have uncovered the fact that Gulf Oil was being double billed. Walker, Gulf's employee, received $1,200 mostly in checks signed by Hankin. Hankin should have been able to perceive the irregularities involved in billing Gulf service station accounts. He kept the books and he sent out the bills. Under Section 73.1205 Hankin's responsibility must be considered as established either by his actual knowledge which may be reasonably inferred or by his failure to exercise reasonable diligence for which he had ample opportunity.

10. On all of the evidence, we must conclude that there was extensive violation of Section 73.1205 by the respondent WLLE, Inc. These violations were known to the principal owner of WLLE or should been known to him in the exercise of reasonable diligence. We conclude, therefore, that this licensee violated the Commission's Rules in an area where, absent other considerations, imposition of the sanction of revocation would be justified.

11. Beginning in March 1973, investigators from the Gulf Oil Corporation discovered the extent to which Gulf Oil had been double billed by WLLE. Gulf Oil made its awareness known to Hankin. Once Hankin knew that Gulf was aware of the double billing, he instituted steps to make a full restitution to Gulf Oil Corporation of the sums that it had been overcharged. Restitution was made to Gulf Oil and, at Gulf's insistence, a release of the service station owners of any liability for the cost of the advertising which WLLE had broadcast on their behalf was included as part of the settlement. In effect Gulf was reimbursed and its

service station operators were released from all liability for advertising carried by WLLE. This resulted in some actual unpaid advertising for Gulf carried by WLLE.

12. Hankin also made restitution to the other advertisters who had been fraudulently billed by WLLE, Inc. To do this, it was necessary to turn station records over for computer analysis. Based upon the computer analysis of the station records, WLLE offered, and made, restitution in the form of either cash refunds or makeup spot announcements.

13. In order to assure future accuracy of billing by the licensee, new billing procedures have been instituted by WLLE. These procedures, if followed, will eliminate the possibility of fraudulent billing of the kind that has taken place. New personnel have been added to the station and a new management group installed to supervise employees. Billing accuracy is now assured by such steps as billing from program logs rather than start orders, preparing affidavits of performance from program logs rather than start orders and by systematic reviews to assure future compliance with the Commission's Rules, the details of these steps are in the Findings of Fact.

14. Hankin, the principal owner of Station WLLE, cooperated with Commission staff in making available his findings regarding the extent of violation of the Commission's Rules by station WLLE. This was not done, however, until after the licensee's fraudulent operations had been uncovered, as a result of the investigations conducted by Gulf Oil and the Commission. Hankin has made clear his understanding of his responsibilities as a licensee and his willingness to assure compliance in the future.

15. Until December 1973 the Commission had generally applied the sanction of monetary forfeiture to licensees found to have violated Section 73.1205 of its Rules. There was a departure from this policy in *Wharton Communications, Inc.*, 44 FCC 2d 489, December 27, 1973. The Commission there decided that a forfeiture would not be a sufficient sanction because:

> Wharton's failure to observe ownership reporting requirements, its numerous and repeated violations of the Commission's technical Rules, the frequency and nature of its fraudulent billing practices, extending over a period of seven years, and the direct involvement of KANI owners and operators in that fraud indicate such an egregious lack of diligence expected of Commission licensees as to demonstrate a protracted, willful and flagrant disregard for the Commission's Rules. In sum, Wharton's misdeeds transcend the pale of pardonable transgression. In view of the total lack of mitigative circumstances, we conclude that a grant of Station KANI's renewal application would substantially contravene the public interest.

16. In *Blackstone Broadcasting Corporation*, 52 FCC 2d 1106, May 8, 1975, the Commission found mitigating circumstances sufficient to warrant a forfeiture rather than the ultimate sanction of denying renewal. Blackstone, the applicant in that case, was granted a renewal of its license and a construction permit for a new FM station but was made to suffer the sanction of forfeiture of $8,000 for violations of Section 73.1205 of the Commission's Rules.

17. In *United Broadcasting Company of Florida, Inc.*, FCC 2d 832, September 30, 1975, the Commission refused to apply *Blackstone* and denied renewal of the license because:

> . . . based on WFAB's performance record in the last license period, we conclude United offers scant prospect of future operation of its frequency in the public interest. The licensee has chosen to ignore responsibilities attaching to its license and has given little attention to the operation of the station except to impress upon its employees the importance of continuing profits. In consequence, WFAB's inexperienced local management had free rein to curry favor with an unscrupulous client, in the process ignoring explicit Commission rules and gaining a competitive advantage over those broadcasters unwilling to blink at questionable practices by an advertiser. Such irresponsible stewardship is incompatible with the licensee's obligations to serve the public interest and constitutes an unfair and intolerable standard of behavior in the broadcast industry.

18. Most recently, on February 25, 1976, the Commission in *Eastminster Broadcasting Corporation*, FCC 76-156, concluded:

> . . . while the Judge found that Eastminster had no specific intent to deceive the Commission, it is clear that, at a minimum, Eastminster displayed complete disregard of, and disinterest in. the Commission's Rules and its responsibilities as a licensee within the regulatory framework under the Communications Act. In such a situation, the question of specific intent to deceive is not the dispositive factor in considering whether renewal of an applicant's licenses is in the public interest. In our view, the repeated and continued misconduct by Eastminster when examined in its totality indicates an abdication of licensee responsibility and establishes that the licensee is unwilling or unable to maintain the degree of supervision and responsibility necessary to insure the proper operation of its stations.

19. Finally, in *Gateway Broadcasting Enterprises, Inc.*, the Commission, on March 1, 1976, FCC 76-183, ordered a forfeiture rather than a revocation. In this most recent decision, the Commission concluded:

> . . . while revocation of the licenses would be inappropriate, the record in this case shows that Gateway has engaged in practices contrary to our established requirements for all broadcast licensees and that the significant deficiencies in Gateway's operation clearly warrant the imposition of the maximum permissible forfeiture as recommended by the Initial Decision. . . .

20. WLLE has engaged in conduct in clear violation of Section 73.1205 of the Commission's Rules. Offsetting this is the fact that WLLE has discontinued these practices, instituted procedures calculated to insure against any repetition and has made restitution to those who have suffered loss as a result of its conduct. Under these circumstances there is no clear Commission policy which requires revocation of the respondent's license. However, WLLE's violations are sufficiently serious to warrant imposition of a substantial sanction.

21. WLLE, Inc. violated a Rule of the Federal Communications Commission during a period within one year of the issuance of the Notice of Forfeiture. Under the forfeiture provisions of Section 503(b) of the Communications Act of 1934, as amended, the maximum forfeiture which can be imposed is the sum of $10,000. This forfeiture will be imposed on WLLE, Inc.

Accordingly, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by a party to the proceeding or the Commission reviews this Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, WLLE, Inc.

SHALL FORFEIT to the United States the sum of $10,000 for the violations specified above. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States.

/s/ Ernest Nash

ERNEST NASH
Administrative Law Judge
Federal Communications
Commission

APPENDIX D

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term, 1978

No. 77-1787

WLLE, Incorporated,
Appellant

v.

Federal Communications Commission,
Appellee

BEFORE: McGowan, Leventhal, and Mackinnon;
Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by appellant WLLE, Incorporated, it is

ORDERED, by the Court, that appellant's aforesaid petition is denied.

Per Curiam

FOR THE COURT:

George A. Fisher
Clerk

Filed Feb. 15, 1979

APPENDIX E

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term, 1978

No. 77-1787

WLLE, Incorporated,
Appellant

v.

Federal Communications Commission,
Appellee

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellant WLLE, Incorporated, having been transmitted to the full Court and no judge having requested a vote with respect thereto, it is

ORDERED, by the Court, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT

George A. Fisher
Clerk

Filed Feb. 15, 1979